

United States  
Circuit Court of Appeals  
For the Ninth Circuit

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UNITED STATES OF AMERICA,  
Appellant,  
vs.  
CARL R. FRANCIS,  
Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United  
States for the District of Montana.

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FILED

JAN - 7 1933

PAUL P. O'BRIEN,  
CLERK



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Circuit Court of Appeals  
For the Ninth Circuit

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD.

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U. S. Attorney,  
Helena, Montana,  
D. L. EGNEW,  
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Helena, Montana,  
D. D. EVANS,  
Insurance Attorney Veterans Administration,  
Helena, Montana,  
Attorneys for Defendant and Appellant. [1]\*

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\*Page numbering appearing at the foot of page of original certified Transcript of Record.

In the District Court of the United States in and  
for the District of Montana.

No. 832.

CARL R. FRANCIS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

BE IT REMEMBERED that on October 7, 1931,  
a complaint was duly filed herein, which is in the  
words and figures following, to-wit: [2]

---

In the District Court of the United States for the  
District of Montana, Billings Division No. 832.

CARL R. FRANCIS,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

### COMPLAINT AT LAW.

The plaintiff complains of the above named de-  
fendant and for cause of action alleges:

1.

That on the 28th day of July, 1917, this plaintiff  
enlisted for military service in the Army of the

United States and thereupon entered upon said enlistment and continued in the service of the United States up to and including the 23rd day of December, 1918, at which time he was honorably discharged from said service, and the plaintiff is now a resident of the City of Big Timber, in the State of Montana.

2.

That while in active service under said enlistment, as aforesaid, the plaintiff made application to the defendant for insurance under the provisions of the War Risk Insurance Act, and the regulations of the War Risk Insurance Bureau established by said act, in the sum of ten thousand and no/100 dollars, and that said application was accepted by the said defendant and a policy of insurance was issued to said plaintiff in said sum of ten thousand and no/100 dollars, and there was deducted monthly by the defendant from the pay of plaintiff for his said services and by the proper officials the monthly premium in payment of the premiums due on said insurance, and this plaintiff has been informed and believes and, therefore, alleges that a certificate of war risk insurance was duly issued to him by the terms whereof the defendant [3] agreed to pay the plaintiff the sum of fifty-seven and 50/100 (\$57.50) dollars per month in the event of total permanent disability incurred by the plaintiff during the life of said insurance contract.

## 3.

That during the life of said insurance contract, and while plaintiff was in the military service of the United States, as aforesaid, said plaintiff became totally and permanently disabled as the result of a wound in the left chest received in action on or about the 11th day of May, 1918, and plaintiff ever since has been and now is so totally and permanently disabled, and ever since has been and now is suffering from pain in the chest over the scar left by said wound; moist rales, left side of upper lobe; rapid and irregular pulse; numbness of right arm; adhesion in pleura, atrophy of left arm with shrinking thereof; chronic myocarditis; chronic nephritis; chronic respiratory infection; and that such injuries and conditions render him totally and permanently disabled, and he has been so totally and permanently disabled since the said 11th day of May, 1918, and will continue to be so totally and permanently disabled as long as he lives.

## 4.

That by reason of the foregoing, this plaintiff became and was totally and permanently disabled on the 11th day of May, 1918, and became entitled to receive from the defendant under the terms of said contract of insurance the sum of fifty-seven and 50/100 (\$57.50) dollars per month for each month thereafter.

## 5.

That on or about the 23rd day of December, 1930, plaintiff made demand upon said defendant for the payment of said insurance, and thereafter filed proofs and negotiations were carried on between plaintiff and defendant, and that thereafter and on the 8th day of August, 1931, said defendant denied said claim of the plaintiff, and plaintiff now alleges that a disagreement exists between plaintiff and defendant as to plaintiff's claim for insurance, and defendant has wholly failed and refused to pay the sum due or any part thereof. [4]

WHEREFORE, plaintiff prays judgment against the defendant for the sum of nine thousand two hundred and no/100 (\$9200.00) dollars, being the amount due him at fifty-seven and 50/100 dollars per month from the 11th day of May, 1918, and for the sum of fifty-seven and 50/100 dollars each month hereafter, together with an allowance for the payment of medical examinations and inspections of plaintiff, and travel incident thereto: that the judgment herein provide for the payment to plaintiff's attorney of a fee of ten per cent of said judgment; for his costs and disbursements herein incurred; and for such other and further relief as to this Honorable Court may seem meet and proper in the premises.

PHILIP SAVARESY,  
Attorney for Plaintiff, Billings, Montana.

State of Montana,  
County of Sweet Grass.—ss.

Carl R. Francis, being duly sworn, upon his oath deposes and says:

That he is the plaintiff named in the foregoing complaint; that he has read the said complaint and knows the contents thereof, and that the matters and things therein stated are true of his own knowledge, except as to such matters and things herein stated on information and belief, and as to those he believes them to be true.

CARL R. FRANCIS.

Subscribed and sworn to before me this 4th day of September, 1931.

[Seal]

MARY J. MICHELS,

Notary Public for State of Montana, residing  
at Big Timber, Montana.

My commission expires Jan. 26, 1934.

[Endorsed]: Filed Oct. 7, 1931. C. R. Garlow,  
Clerk. [5]

---

Thereafter, on January 15, 1932, answer was duly filed herein, which is in the words and figures following, to-wit: [6]



[Title of Court and Cause.]

ANSWER.

Comes now the defendant and for its answer to the complaint of the plaintiff herein admits, denies and alleges:

I.

Admits the allegations of Paragraph I of the complaint herein, except as to the residence of the plaintiff, and denies that Carl R. Francis is now a resident of the City of Big Timber in the State of Montana.

II.

Denies the allegations contained in Paragraph II of the complaint herein.

III.

Denies the allegations contained in Paragraph III of the complaint herein.

IV.

Denies the allegations of Paragraph IV of the complaint herein.

V.

Admits that the plaintiff made demand upon the defendant for the payment of said insurance and admits that he filed proofs and admits that the defendant denied the claim of the plaintiff, and that a disagreement exists, and denies each and

every other allegation in said paragraph V and in all of the complaint not hereinbefore specifically admitted, denied or qualified. [7]

WHEREFORE, the defendant prays judgment that the case be dismissed and the defendant have its costs.

WELLINGTON D. RANKIN,  
United States District Attorney, for the District  
of Montana.

By D. L. EGNEW,  
Assistant U. S. District Attorney for the District  
of Montana.

D. D. EVANS,  
Insurance Attorney.  
(Attorneys for the Defendant.)

United States of America,  
District of Montana.—ss.

D. L. Egnew, being first duly sworn on oath, deposes and says: that he is an Assistant United States Attorney for the District of Montana and that he has read the contents of the foregoing answer and that the same are true according to his best knowledge, information and belief.

D. L. EGNEW.

Subscribed and sworn to before me this 9th day  
of January, 1932.

[Seal]

H. H. WALKER,  
Deputy Clerk.



Service of the within answer admitted and a copy had this 11th day of Jan., 1932.

PHILIP SAVARESY,  
Attorney for the Plaintiff.

[Endorsed]: Filed Jan. 15, 1932. C. R. Garlow,  
Clerk. [8]

---

Thereafter, on June 9, 1932, verdict was duly rendered and filed herein, which is in the words and figures following, to-wit: [9]

[Title of Court and Cause.]

VERDICT OF THE JURY.

We, the jury, duly impanelled and sworn to try the issues in the above entitled action, find all of the issues herein in favor of the plaintiff, Carl R. Francis, and against the defendant, The United States of America, and find that the said Carl R. Francis became permanently and totally disabled on May 10th, 1918, and entitled to monthly payments of Fifty seven and 50/100 (\$57.50) Dollars per month from that date.

THOS. A. TOBIN,  
Foreman.

[Endorsed]: Filed June 9, 1932. C. R. Garlow,  
Clerk. [10]

Thereafter, on June 17, 1932, judgment was duly filed herein, which is in the words and figures following, to-wit: [11]

In the District Court of the United States for the  
District of Montana, Billings Division.

No. 832

CARL R. FRANCIS,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

### JUDGMENT.

This cause came on regularly for trial on the 8th day of June, 1932, Philip Savaresy and George S. Smith, both of Billings, Montana, appearing as Counsel for plaintiff, and D. L. Egnew, Esq., Assistant United States Attorney for the District of Montana, and D. D. Evans, Esq., Insurance Attorney for the United States Veterans Administration, appearing as Counsel for the defendant. A jury of twelve persons were duly and regularly impanelled and sworn to try the issues in said cause, witnesses were sworn and testified for and in behalf of plaintiff and defendant, and after hearing the evidence, arguments of the respective counsel and the instructions of the Court, the jury retired to consider their verdict. After due deliberation, the jury returned its verdict into Court in the words and figures as follows, to-wit:

[Title of Court and Cause.]

VERDICT OF THE JURY.

We, the jury, duly impanelled and sworn to try the issues in the above entitled action, find all of the issues herein in favor of the plaintiff, Carl R. Francis, and against the defendant, The United States of America, and find that the said Carl R. Francis became permanently and totally disabled on May 10th, 1918, and entitled to monthly payments of Fifty Seven and 50/100 (\$57.50) Dollars [12] per month from that date.

Thos. A. Tobin, Foreman.

WHEREFORE, by virtue of the law and by reason of the premises aforesaid, it is ORDERED, ADJUDGED AND DECREED, That Carl R. Francis, plaintiff, do have and recover of the defendant, The United States of America, the sum of Ninety two hundred and no/100 (\$9200.00) dollars, and all further payments which may be due under the contract of insurance and in accordance with law, said sum of ninety two hundred and no/100 (\$9200.00) dollars being the installments on said insurance from May 10, 1918, to the 10th day of September, 1931, being the monthly anniversary date of the commencement of said permanent and total disability immediately preceding the filing of the complaint herein; and the Court, as a part of its judgment, determines and allows as a reasonable attorney's fee for the attorneys of the plaintiff for services rendered and/or to be rendered herein ten

(10%) per cent. of the amount recovered under the contract of insurance and to be paid by the United States Veterans Administration out of the payments made under this judgment and in accordance with law at a rate of ten (10%) per cent. of each and all of such payments until paid in full and to be deducted from such payments made to the plaintiff.

Judgment entered this 17th day of June, A. D. 1932.

CHARLES N. PRAY,  
Judge.

[Endorsed]: Filed June 17, 1932. C. R. Garlow,  
Clerk. [13]

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Thereafter, on September 30, 1932, bill of exceptions as signed, settled and allowed was duly filed herein, which is in the words and figures following, to-wit: [14]

[Title of Court and Cause.]

#### BILL OF EXCEPTIONS.

BE IT REMEMBERED, That this cause came on regularly for trial at 10:30 o'clock A. M., on the 8th day of June, 1932, before Honorable Charles N. Pray, one of the Judges of the above entitled Court, sitting with a jury, at Billings, Montana. George S. Smith and Philip Savaresy, of Billings, Montana, appeared as counsel for the plaintiff, and

D. D. Evans, Insurance Attorney for the Veterans Administration, and D. L. Agnew, Assistant United States Attorney, of Helena, Montana, appeared as counsel for the defendant. A jury of twelve men having been duly and regularly empanelled and sworn to try the issues, the following proceedings were had:

The plaintiff offered the following evidence in support of his complaint:

TESTIMONY OF CARL R. FRANCIS,

in his own behalf:

My name is Carl R. Francis. I reside in Billings, Montana. I am thirty-seven years old. I am a married man and I have seven children, two of whom are stepchildren. Yes, in my complaint I stated that I was a resident of Big Timber at that time. It so happened that I was working at Big Timber, in the rodeo, and was temporarily residing there at the time the complaint was sent to me. Outside of that I have been a resident of Billings for eleven years or so. [15]

I enlisted in the service about July 28, 1917, from Miles City—my discharge shows Helena. I was in the service until December 23, 1918. I was discharged with an honorable discharge. At date of enlistment I was twenty-two years old. I was not married at that time. I have had two years education in High School and a short course in book-keeping and typing. While I was in school before entering the service, I worked for my board in a



(Testimony of Carl R. Francis.)

hotel, and later, I was in the oil fields, on a tank farm, as a steel worker, that is, a boiler maker, and I had harvested some in Kansas, and had done a little work in cooking—counter work—at Tulsa, Oklahoma. Yes, I mean by that restaurant work. No, I never did any clerical work before that.

Before entering the service my physical condition and nervous condition were good. I never had any sickness or accidents before that. I was in the infantry branch of the service during all of my service and I did overseas duty. I sailed December 15, 1917. I first went to Liverpool, England. I eventually went to France, about three weeks later. After I got there I first went to Le Havre and from there to Leacourtine, France. I enlisted in A Company, 16th Infantry. After I got to A Company, of the 16th Infantry, I made application for war risk insurance. That is my signature to "Plaintiff's Exhibit A" and it is an application for war risk insurance.

Mr. SMITH.—I will read this:

Headed: "Application for War Risk Insurance. I hereby apply for insurance, \$10,000.00, payable to myself, for total, permanent disability. My full name is Carl R. Francis. Born on the 11th of February, 1895. My age is 23 years. Home address, Miles City, Montana. Company A, 16th Infantry, A. E. F. Date of enlistment, July 28, 1917."

Exhibit A.

APPLICATION FOR INSURANCE  
to  
BUREAU OF WAR RISK INSURANCE  
UNITED STATES TREASURY DEPARTMENT

MAKE NO  
ENTRIES HERE

Received .....  
Entry number .....  
Index card....L. W.....  
Abstracted .....on  
Sheet No. ....  
Acknowledged .....  
Application Number .....

I hereby apply for insurance in the sum of \$10,000, payable to myself during total permanent disability and from and after my death to the following persons in the following amounts:

Name of Beneficiary (If married woman her own christian name must be stated)	Relationship to applicant	Post Office Address of each beneficiary (Full address must be given)	Amount to be paid to each beneficiary
Allie Cly Francis	Sister	Norris, Okla.	\$10,000

In case any beneficiary dies or becomes disqualified after becoming entitled to an installment but before receiving all installments, the remaining install-

ments are to be paid to such person or persons within the permitted class of beneficiaries as could under the laws of my place of residence be entitled to my personal property in case of intestacy. I authorize the necessary monthly deduction from my pay or if insufficient, from any deposit with the United States in payment of the premiums as they become due unless they be otherwise paid. If this application is for more than \$4,000 insurance I offer it and it is to be deemed made as of the date of signature. If this application is for less than \$4,500 insurance and in favor of wife, child or widowed mother, I offer it and it is to be deemed made as of February 12, 1918. If this application is for less than \$4,500 and in favor of some person or persons other than wife, child or widowed mother, I offer it and it is to be deemed made as of date of signature.

My full name is Carl R. Francis.

I was born on the 11th day of February, 1895, my age at nearest birthday being 23 years.

Home address.....none....., Miles City, Mont.  
(street and number) (city) (state)

Rank Pvt., Organization Co. A 16th Inf. station, A. E. F.

Date of enlistment or appointment July 28, 1917.

Signed at MY STATION, A. E. F. this 22nd day of Jan. 1918.

S/ Carl R. Francis.  
(signature of applicant)

Witnessed by

Basil D. Spalding

Capt. Inf. [17]



Mr. EVANS.—At this time, it may be admitted by the defendant that \$10,000.00 of insurance was in force May 10, 1918, the date from which the plaintiff claims permanent and total disability. At the time of the pleadings, I did not have the data and was, therefore, forced to deny. It will [16] be further admitted that it was in force on April 1, 1919, and that it lapsed for nonpayment of the premium due in April of 1919, as conceded by the plaintiff; also——

The COURT.—What is the date of the lapse?

Mr. SMITH.—May 1, 1919.

Mr. EVANS.—It may also be admitted that a disagreement exists, and that no proof is necessary.

(Testimony of Carl R. Francis.)

(Plaintiff continuing): After I got to France I went to what is known as the front lines. That was the last of January, 1918, or the first of February, 1918. I was almost continuously on the front pretty much of the time until the 11th of May, 1918, outside of times when we went to rest camps—back and forth between front lines and rest areas—but almost continuously on the front. Coming down to the evening of May 10, 1918, and the morning of the 11th, 1918, I was acting as guide for 2nd Platoon of A Company, 16th Infantry, and that night I was to bring the F Company of the 16th Infantry out—relieve them from duty—and to guide Company A in. I was going in on the evening of May 10th after dark. We were in the woods, had been camped back of the town of Buray,

(Testimony of Carl R. Francis.)

and we were to go up that night and take the road so many paces apart, and just as we got through the town and just as we got out, the enemy began shelling the road and I was hit by high explosive—3 inch shell. I do not know when I was hit. I felt the burn and lost the use of my left side and arm, but I didn't feel any pain. There was some doubt as to whether we were following the 1st Platoon of A Compnay, 16th Infantry, and I told the Sergeant in charge of the 2nd that I would go up and see if it was the 1st Platoon. Of course we all fell at the side of the road when they began shelling, and I went up there, and when they came up, I told Rogers I believed I was hit, as I felt blood inside of my shirt. He told me to go back to the regimental infirmary, and before we got back there, [18] the man, Higgins, who had been detailed to take me back, was carrying me, or almost carrying me. Then from then on I was in the hospital until the time of my discharge. They gave me a shot in the back, to prevent blood poisoning, and then as they could get an ambulance, I and others who were there were put in, but they figured they would push farther back in the lines, to pick up other wounded, and I suppose it was that night I lost track of time, and we went out and hit several field hospitals where they would sometimes take patients, and we would always stop and get attention, and they would keep relaying us back, and we finally reached a French Base Hospital, and I was oper-

(Testimony of Carl R. Francis.)

ated on there. No, they did not get the shrapnel out. I went under ether there, and I thought they did. Later I went to Military Red Cross No. 1, Paris, France. I was operated on at that place, under ether. From there I went to Base No. 34, Nantes, France. I was in Paris a week or ten days. They did not get the shrapnel out at Paris. After I got to Base No. 34, I was operated on several times. I should judge six times, under ether. That would be under a complete anaesthetic. I was operated on under a local several times. I was full of pus, and they decided that they could reach the shell from under my arm, and they would probe for that several times a day, probably two or three times, and give me daily dressings, and at times, it was dressed three or four times a day, and they had tubes in these places, and what they call Dakin's solutions. They used so many drops a minute. On this incision under my arm the Doctor would use just a local and would come up and say: "Now we are going to have some fun," and would start probing. Yes, I knew when they got the shrapnel out. I had bled several times, and finally I got where they had to give me blood, several hundred cc's of blood, and after that they took me right down to the operating room and went into my back and took the piece of shrapnel out. During the time this shrapnel was in my body I had fever and I was down to skin and bones, [19] you might say. Yes, it is my recollection that I had continuous fever

(Testimony of Carl R. Francis.)

during that time. I was full of pus all the time. As I remember, it was three months from the date I was hit—the 10th of August—that the shrapnel was taken out. Between the time I was hit and this time, I had this local anaesthesia under the arm, sometimes often and was practically confined to my bed all the time I was there. When doing this probing under my arm with a local it caused me much pain. There was not much pain on the outside, but down in, it was terrible. These daily dressings would give me pain. When I heard the nurses and doctors coming, I would cover up my ears, and it was a daily dread. We would lay in bed and hear the dressing table coming down the ward and would just cringe with dread of what was coming. Before they got the shrapnel out I had bleedings and hemorrhages; frequently everything seemed to give way and start bleeding. Then the doctors and nurses would come up with crooked needles and reach in through the wound in my chest and sew me up. That would be done without an anaesthetic. It would cause me great pain. For some time I was in the death ward—a place with twelve beds in it—and when a patient was very bad, he would be taken there—more to give him special attention. It was just dubbed the death ward. It was recognized as a place where serious cases were taken. During the time I was in the hospital I had some coughing spells. They were bad, and they would hold the coughs down as much

(Testimony of Carl R. Francis.)

as possible. I couldn't smoke; it would tear me, choke me, if I did. I lost weight while I was in there. I was down to skin and bones, less than 100 pounds, I imagine. I did not have the use of my left arm. It was in a sling practically all the time. Just before I left there, I began to use it a little. I was a bed patient most of the time until after the shell was taken out. After the shell was taken out, I was not able to straighten up—I didn't really straighten up, and I didn't really get the use of my left arm until I got to Des Moines, Iowa. After they got the shrapnel [20] out, I can't be positive how long I was in bed after that, but I imagine a month or a month and a half—two months—I have no way of knowing.

I understand that empyema is pus on the lungs. I was full of pus practically all the time. They had tubes in me on account of that. The size of these tubes I should judge was about the size of my thumb and cut different ways. They were of black, curved rubber and they would stick them in there—in all the places where the scars are now. The shrapnel was taken out of my back; they had to cut down the back to get it. I had a tube in two places in the back and under the arm and in front. After I got up I was in the hospital practically all the time until after I was discharged. I was really convalescent at a time just before the discharge, but I don't remember just when. I was what is known as a convalescent patient. We didn't have our clothes.



(Testimony of Carl R. Francis.)

We wore pajamas and bathrobes. We didn't have to stay right in bed. I stayed in the hospital until a day or two before my discharge. I was discharged from Fort Riley, Kansas. I have scars on my body showing these wounds.

Mr. SMITH.—Your Honor, I would like to have the plaintiff show these to the jury, with Your Honor's permission.

The COURT.—All right.

Mr. SMITH.—Take off your coat (to witness).

(Witness removes coat and exhibits scars to the jury.)

Mr. SMITH.—Does Your Honor wish to look at them?

The COURT.—No, sir.

Mr. EVANS.—One question, Mr. Francis. Did you see the shrapnel when it was taken out?

Mr. FRANCIS.—I did.

Mr. EVANS.—How large was it,

Mr. FRANCIS.—Oh, about the size of the end of my thumb. [21]

Mr. Evans. I thought the jury might be interested so as to distinguish between the shrapnel wound and wound of operation afterwards.

Mr. Smith. At this time, I would like to have this man's service record, Mr. Evans.

(Mr. Evans produces service record).

(Plaintiff continuing). That is my signature to the document marked "Plaintiff's Exhibit B," and it was made at the time of my discharge.

Mr. Smith. I now offer Plaintiff's Exhibit B in evidence.

The Court. Let it be admitted and read to the jury.

(Document is read to the jury.)

EXHIBIT B.

C—132 785

REPORT OF PHYSICAL EXAMINATION OF  
ENLISTED MAN PRIOR TO SEPARA-  
TION FROM SERVICE IN THE UNITED  
STATES ARMY.

Francis                      Carl R.                      41682                      ber)  
(Surname)    (Christian Name)    (Army serial num-  
Pvt.            4th Co., 2nd Bn. 164 D.B.    department)  
(Grade)    (Company and regiment or arm or corps or  
Cook  
(Occupation prior to entry into service.)

DECLARATION OF SOLDIER.

Question. Have you any reason to believe that at the present time you are suffering from the effects of any wound, injury, or disease, or that you have any disability or impairment, of health, whether or not incurred in the military service:

Answer. Yes.

Q. If so, describe the disability, stating the nature and location of the wound, injury, or disease.

A. Shell fragment wound left chest.

Q. When was the disability incurred?

A. May 10th, 1918.

Q. Where was the disability incurred?

A. Broyes, France.

Q. State the circumstances, if known, under which the disability was incurred.

A. Wounded in action.

I declare that the foregoing questions and my answers thereto have been read over to me, and that I fully understand the questions, and that my replies to them are true in every respect and are correctly recorded.

S/ Carl R. Francis  
(Signature of soldier.)

Witness:

Chas. W. Abbott

(Signature of witnessing officer.)

Charles W. Abbott, Capt. Inf. U. S. A.

4th Co. 2nd Bn. 164 D. B.

(Rank and organization.)

Place Camp Funston, Kansas.

Date December 21, 1918.

Form No. 135-3, A. G. O.

Nov. 11, 1918. [22]

### CERTIFICATE OF IMMEDIATE COMMAND- ING OFFICER.

I CERTIFY THAT:

Aside from his own statement I do not know, nor have I any reason to believe, that the soldier who made and signed the foregoing declaration has a wound, injury, or disease at the present time, whether or not incurred in the military service of the United States.



The soldier who made and signed the foregoing declaration has a wound, injury, or disease, which was incurred about May 10, 1918, at Broys, France.

The nature and location of the wound, injury, or disease, so far as known, are Shell fragment wound left chest.

The circumstances under which incurred were Wounded in action.

In my opinion the wound did originate in the line of duty in the military service of the United States.

Remarks

S/ Chas. W. Abbott.

Chas. W. Abbott, Capt. Inf. USA. 4th Co., 2nd Bn.  
164 D. B.

Camp Funston, Kansas, Dec. 21, 1918.

(Place and date)

CERTIFICATE OF EXAMINING SURGEON.

I CERTIFY THAT:

The soldier named above has this date been given a careful physical examination, and it is found that

He is physically and mentally sound with the following exceptions: (Describe the nature and location of the defect, wound, injury, or disease.)

Shell fragment wound left chest anterior, left axilla, and lower angle of scapula posterior. Adhesions throughout left chest as a result.

The wound, injury or disease is likely to result in disability.

In my opinion the wound, injury, or disease did originate in the line of duty in the military service of the United States.

In view of occupation he is thirty (30) per cent disabled. Remarks.

S/ G. K. Purves,

G. K. Purves, Capt. M. C.

Camp Funston, Kansas, Dec. 21, 1918.

(Place and date)[23]

(4)

### REPORT OF BOARD OF REVIEW.

(See instruction 2.)

From a careful consideration of the case and a critical examination of the soldier,

#### WE FIND:

He is physically and mentally sound with the following exceptions: (Describe the nature and location of the defect, wound, injury, or disease.)

Diagnosis and remarks of examining Surgeon concurred in.

The wound, injury, or disease is likely to result in death or disability.

In our opinion the wound, injury, or disease did originate in the line of duty in the service of the United States.

In view of occupation, he is thirty per cent disabled.

S/ Jasper Wm. Lockhart, Capt., M. C., U. S. Army.

(Name)

(Rank)

Jasper Wm. Lockhart.

S/ Sydney J. Havre, 1st. Lt., M. C. U. S. Army.  
(Name) (Rank)

Sydney J. Havre.

S/ Grant S. Reeder, 1st. Lt., M. C., U. S. Army.  
(Name) (Rank)

Grant S. Reeder.

Camp Funston, Kansas, December 21, 1918.

(Place and date)

### INSTRUCTIONS.

1. This report will be made out for each soldier, immediately preceding separation from service in The United States Army.

2. If the declaration of the soldier and the certificate of the examining surgeon do not agree, the case will be referred to a board of review, to consist of not less than two medical officers, convened by the camp, post, or regimental commander, which will complete the report on page 4 of this form.

3. When completed the report will be forwarded, with the service record of the soldier, to the Adjutant General of the Army in compliance with instructions prescribed in orders and regulations. [24]

Mr. Evans. Your Honor, if the Court has no objection, may we have an order that a copy be made of this exhibit to be placed in the files in this case, 'in order that the original may be returned to the records of the Veterans Bureau—and this applies to Exhibit A also.

(The Court assents.)

(Testimony of Carl R. Francis.)

(Plaintiff continuing). After I was discharged from service I went to my father's home, which was at that time at Walls, Oklahoma. I stayed there about six months. He moved at that time to Talihina, Oklahoma. While there I didn't do any work at all. I was not able to do any. I just lay around the greater part of the time, thinking to gain strength. A little later I put in an application for compensation. It was awarded. They allowed me total until I went up to Forth Smith, Arkansas, and went to work on a job there and wrote and told them, and they cut me down. I have been paid compensation at all times since, continuously, outside of when I was in vocational training. There have been different percentages of disability awarded me, from 20% to total. At the present time I am getting \$66.00. I imagine that means 66%. This compensation I speak about—that was a different payment [25] entirely from this insurance. There is no connection whatever. Since I have been out of the Army I have been in Government hospitals about four times, maybe more. One time I was there for a day or two, and it seems to me at the other times for a month or more. I am not positive about that.

After leaving my father's home I went to work. I first worked at the Wide-Awake Cafe at Fort Smith, Arkansas. I started to work there through strawberry time—must have been April or May. I was there six weeks. That was in 1919. I did

(Testimony of Carl R. Francis.)

counter work as a waiter. They wouldn't let me do table work because I couldn't carry the loads. I could carry one or two orders at a time—coffee and such things. I stayed there six weeks as I remember. I quit there, I didn't feel good there and I wanted to get back to Montana. I felt the mountains would make me all right. I wrote to the Veterans Bureau at the time and told them I wanted to get back to Montana.

I next worked at the Albin Cafe, at Cheyenne, Wyoming. I worked five days, during the rodeo. I helped in the kitchen. I was not able to do my work there. They used me because it was Fair time and help was hard to get. As soon as that was over, the job expired. I was there five days, during July.

I next worked in 1919 at Miles City, for Jim Peterson. I had worked for him before I enlisted. He didn't put me to work when I got there, but finally he found a place for me, and I must have been there six weeks or two months. I was a waiter. I did not satisfactorily perform all the duties of a waiter there; on account of my inability to carry loads, nervousness, I slopped coffee all over and dropped things, and my general nervous condition. I did not leave there, but the place was sold and the help retained, but within a few days I was discharged. I worked for the new proprietor two or three days and I was then discharged. The place was filled by some one else. I was discharged



(Testimony of Carl R. Francis.)

on account of my inability to discharge the duties required of me, along the lines mentioned. [26] It must have been September or October, 1919, when I worked for Jim Peterson.

Next I worked at the Ingham Cafe, now Metropolitan Cafe, at Miles City. I worked there about a month or six weeks, as a waiter. There was practically no business. I worked afternoons. It was just a matter of some one being there. I left there and went into vocational training. I went into vocational training about February, 1920, as I remember. I was placed in that training by the Vocational Board. They first sent me to the Bozeman State College, at Bozeman. I first learned bookkeeping, typing and accounting. I continued with that course a very short time. I don't know exactly. They took me off typing. The teacher said I couldn't keep my mind on that, and they took me off that and left me with bookkeeping and I stayed with that probably, say, a month, maybe more, and they changed my objective to baking. I was not able to make any progress at Bozeman, none whatsoever, and I was surprised, as I had considered myself a good student before, but I got nervous and I wanted to kick things. I could not stand it to be inside, in a classroom. There was an advisory board came down from Minneapolis and they talked and spoke of this baking course, and I thought with what restaurant experience I had had, it would be a good thing, and I spoke to them

(Testimony of Carl R. Francis.)

and they changed my objective to baking, the Board did. When I was at Bozeman I did make a sincere attempt to do my work. I wouldn't have taken vocational work if I hadn't wanted to better myself. After the Board changed me to baking, they sent me to the Purity Bread Company in Billings, Montana. I had to have some preliminary experience before they would accept me at Dunwoody, two years at high school and two years actual baking experience, and they put me in the Purity Bread Company in order to gain actual baking experience. I was unable to do the bread work there; it was too heavy for me, and I was put downstairs in the cake room, where the work is light. My work was mostly [27] observation, to learn what I could, and of course help out. If I had been employed there as a cake baker, there would have been heavy lifting connected with the work there. As it was, there was none for me to do. I was not getting any pay from the Purity Bread Company. As I remember, all bakers take their bread home, and I was entitled to that, but that was before I was married, I didn't need it, and I don't remember that I received any pay at all. I was with the Purity Bread Company until through the winter of 1920 into the spring, up until July, I believe, 1921, no, 1920.

From the Purity Bread Company I went to Minneapolis, to Dunwoody. Dunwoody is a school where milling and baking and chemistry are taught,

(Testimony of Carl R. Francis.)

and was founded no doubt by a man named Dunwoody. I was there six months. My work consisted of chemical work—work in the experimental laboratory, classroom, dough room and bake shop. I couldn't keep up with my chemistry or laboratory work; it was too tedious; I couldn't do that on account of nervousness. I couldn't concentrate; I had to have more action. The bake shop work consisted of learning all about the machinery; after the dough is done, moulding it—all machinery—panning, proving and baking. There is no real, actual work to do there; all machinery classes, as they were divided, were put in twelve to sixteen at the time. In reference to the experimental shop work, they had an experimental baker. Six of us would go there for so many days. We were allowed to experiment. We had a small mixing machine and we could mix six loaves of bread at a time. We were allowed to experiment with anything we wanted to. There was no heavy work connected with that. With reference to the laboratory work down there, I did not do any of that with any results. I didn't get a certificate that I had finished the work because you have to have two years actual experience before they issue you a certificate. I was never able to get that.

After I finished my schooling at Dunwoody, the Board sent me to Nichols' Bakery, at Billings, Montana. I [28] was there a short time, probably a month or a month and a half. The work consisted



(Testimony of Carl R. Francis.)

of just general shop work, all hand work, and general bake shop work. I was physically unable to do the work. The bench work was too heavy; the lifting of pans was too heavy. The pans were made in sections and weigh quite a bit, 30 or 40 pounds, and it was impossible for me to handle the fans with the heat, and those probably weigh 75 to 100 pounds, maybe 50, and they had to be handled and I couldn't do that. My condition after I had worked there for a day was, well, I would get up at four o'clock and go down and work until three, sometimes until five o'clock. I came alone and I stayed at a hotel, and when I would go off shift, would throw myself on the bed and lay there until time to go to work in the morning, with nothing to eat and without undressing. If everything went all right, I would quit work at the bakery each day maybe three o'clock—just whenever I finished my work.

After I had worked at Nichols' Bakery for this period I went to George Stevens, the Bureau man here, and told him I just couldn't stand it; I couldn't do the work; it was killing me to be there; and the Government transferred me away from there. I was transferred to some other work, restaurant work. For that reason I never got the two years' training which it was necessary for me to have in order to entitle me to a diploma at Dunwoody. It was the Vocational Board that made the transfer to cooking; they changed my objective.

(Testimony of Carl R. Francis.)

I first went to the Metropolitan Cafe at Billings in that work. I was there a few weeks, just to pick up what I could, to observe and to work into a job. From there I went to the Main Cafe. I finished my training there, that is, the old Main cafe here in Billings.

I was there at the Main Cafe a year or more, possibly sixteen months. I do not remember when I finished my training. It must have been in August, September or August, 1920, or it may have been 1921. It would have to be 1922 if I started school in 1920. I had no fixed duties in the Main Cafe, [29] and at the Metropolitan Cafe I didn't do any work; in fact, they wouldn't let me. I tried to do work at both the Main and the Metropolitan, with no success. I was too weak—just couldn't keep up with the work, on account of lack of strength. My nervous condition was bad enough; it was bad all right.

After I left Vocational Training, I first worked at Shelling's Cafe, here in Billings, for about two months. I don't remember what months those were. It must have been December, 1922, and January, 1923; it comes to me it was. My duties there were as cook. I was not able to discharge my duties; I couldn't do the lifting. If it got real busy, I couldn't stand the heat over the range, and I couldn't look after the job without help. I had fainting spells and trouble with my side. While I was there I was helped by the others. Any of the

(Testimony of Carl R. Francis.)

help who happened to be around and Mr. Shelling helped me. I was supposed to be doing work ordinarily done by a cook. I was discharged eventually because I couldn't swing the job.

My next work I believe was at the Metropolitan, possibly the Luzon. That was in August and September, 1923, through Fair time, yes. That was during a busy time, during the Fair. My work consisted of being a waiter. I helped out—it was a busy time and they had to have help. I carried the loads on my right arm.

From January, 1923, until August of that year I didn't do any work. I wasn't able to do the work. I was sick a great part of the time.

After I left the Luzon I can't say positively where I next worked—I can't remember. Yes, it was the Ferndale. I started to work there about January, 1923, or 1924. I worked there about two years and eight months. I left there I believe about August, 1926, I did chef and general kitchen work—pastry. There was no real hard work there for me, no, because I wasn't able to do it, and what I couldn't do some one else had to do for me. I had help there in doing my work. Whoever happened to be on shift—sometimes it was some one from the [30] dining room and sometimes some one from the kitchen. Ordinarily it was the dishwasher, and during most of the time I was there, there was some one with me an hour in the morning and evening, before I would go off shift. There was heavy

(Testimony of Carl R. Francis.)

lifting to be done, and I couldn't have done it. Yes, I had duties as a cook doing some heavy lifting; there was work that should have been mine. I got it done by calling some one who could do it, or by leaving it for the next shift. Those heavy things that were to be lifted consisted of pots, the large containers canned goods might come in, maybe lard. Most of the meat was cut there, outside of heavy ribs and such like. The stock pots—it was impossible for me to lift those, if they were of any weight at all. I would call the dishwasher to lift those. I should have done it ordinarily. I had other trouble in doing my work—faintness, drawing under my heart or pain under there, and at times I would get a catch in my neck and this would make me sick. When I get these spells—these catches—I cannot continue with my work. I have to sit down and lay across a table or bed on my stomach. These spells would last any time from five minutes to half an hour. The spells would vary. Sometimes I wouldn't notice it for days or weeks, and then again it would happen several times a day for weeks at a time. There was no set time when they would come on. If I would get overheated, I would naturally think that was the cause. These spells came on at that time, after I got overheated. If I would work very long at a time, I would get awfully tired in the left shoulder blade and this would cause it to ache and I would get a catch in my neck from it, and I would have to stop my



(Testimony of Carl R. Francis.)

work until this eased up. I would just have to let my work go and some one else take care of it, or if not, it would pile up, and they would have to get along as best they could. There was almost always some one there to help. I was discharged from there because I couldn't do my work as I should. [31]

My next employment was at the Metropolitan. I was there just a short time, through the Fair. My experiences there were the same as at the Ferndale.

I next worked after that at the New Bungalow. I was there one or two months, in September or October, 1926. They made special arrangements for me there. They built the tables high so I could work on them; they arranged the help so I could have help when needed, for lifting, and they made special arrangements about the tables. Frank Larson was the Manager there and Bill Carlin was the owner. I was not able to do my work there. My experiences there were similar to what they were at the Ferndale.

My next work was at the Northern Hotel. I am not sure when it was, but I believe it was, as you say, in March, 1927—from March 17, 1927 to May 24, 1927. Tom Peterson was the chef and Mr. Blair the steward there. My experiences there were about the same. I couldn't stand the heat, had fainting spells and would have to go to the door for air and rest right along. The work was too heavy for me there. I couldn't stand the heat from the boiler. I

(Testimony of Carl R. Francis.)

left that work as I went to the hospital at Helena—was sent there by Dr. Wernham.

My next work, I went back to the Ferndale again. I tried to get back in the Northern, but they wouldn't take me back. I was there at the Ferndale this time from July, 1927 to April, 1931. My experiences there compared to before were practically the same. People helped me out there all the time. I quit the Ferndale in April, 1931 because I had gotten in such shape I couldn't get along with anyone—was in a nervous condition. I dreaded to go to work, and when I would leave, I would go home and go to bed and maybe never leave home until it was time to go to work the next morning, and maybe something would come up that would upset me, and I would go all to pieces, and so I just quit. I knew Mr. Loomis was dissatisfied with my work.

After leaving the Ferndale this time I went to work for Bill Carlin, Carlin Cafe. I worked there about a month and a [32] half. I was discharged because of inability to do the work—along the same lines.

After that I worked at the Byron Cafe. I worked there six days. I went there with the understanding that Mr. Byron was to do the heavy work, such as blocking the meat, so that I wouldn't have to lift loins, etc. He was to do that, but he had to go to Bozeman, and I couldn't do it, and so I was discharged by the Manager.



(Testimony of Carl R. Francis.)

After that I worked at the Big Timber Cafe, at Big Timber. I was there through a rodeo—I don't remember how long, during a rush season. The butcher blocked the meat out and Mr. Webb is a cook himself, and he came to the kitchen and helped me with things I couldn't do. I worked there for a few weeks, but I found the work was too heavy, and I was away from home, so I left.

Since then I ran a lunch room at the Sugar Factory. I had some one with me all the time. I didn't do any of the work myself, practically none.

I worked at Casey's, at Laurel, through the Basketball Tournament. I got along with his help; he was there in the kitchen a good deal of the time. After the Tournament was over, they didn't need me any longer. After that I didn't work at all for three months.

Now I am working at the Billings Golf and Country Club. I can't do any work there whatever; I have to hire it done. Referring to these different places where I was employed, I know I couldn't have done my work as I should have done it, and that I could have done it without assistance. My physical condition from the time of my discharge from the Army to the present time has been bad, generally,—nervousness, aching in my left arm and muscles down into the palm of my hand, mostly the little finger and next to it. I have been suffering from catches in the wound for years it seems to me—since I was out of the Army—ever since I was

(Testimony of Carl R. Francis.)

hurt. My recollection is that those attacks [33] came at all times since my discharge from the Army. These spells just knock me out. If I can, I have to lay down. I am not unconscious, but I am—I just have to lay down, my left arm down, until it goes away. It makes me weak and nervous and I sweat, and if at times I reach for things, without thinking of it, I get a catch here (indicating) and it goes into my neck, and that is very painful. These attacks are accompanied by dizziness, and I am sort of groggy, but I am not plumb out—not unconscious. I know what is going on, but I am not able to carry on. These attacks are accompanied by drawing pain—I imagine it is in my heart. It feels like pulling in, and it is very painful. After it lets up, I am sick and weak. I have had these attacks since my discharge at various times—sometimes maybe I won't have one for weeks or months and maybe longer, and then again they will come several times a day for weeks at a time. When they come I have to lay down, oh, for five minutes to half hour, and sometimes for an hour, until I feel good, and I just feel like staying in bed. They are more apt to come when I am tired. Referring to this pain in my shoulder, it comes just when I happen to get in that particular position. I would not be able to continue with my work then for a while. It would be five, ten, fifteen minutes before I would be able to get over them. I have been troubled with those pains since my discharge continuously.

(Testimony of Carl R. Francis.)

Referring to my work as a chef in a restaurant, that requires concentration or mind work. You have got to figure stuff, make your menus, etc. You have got to keep the orders coming into the kitchen in your mind, supposed to remember them. I must have been forgetful, as frequently arguments over mistakes I would make took place. I remember that there has been difficulty in this respect. After I do a day's work I go home and go to bed. I go home and go to bed almost every day after my work. I would unless there was something that was very important to keep me up. This has been continuous since my discharge. I would probably get up and read the paper and sometimes [34] eat a bite, and I like to be at home once a day with my family, and as a rule would try to stay up. I have taken in very few shows—maybe once or twice a month. Several times I have had to leave a show on account of dizzy spells. Maybe I attend a P. T. A. meeting now and then, or possibly a lodge meeting, but most of my time has been spent at work or in bed, since I was in the Army. (I feel that I have been getting worse since I was discharged from the Army. My nerves now are bad. I can't stand any sharp noises—can't stand it—I have just got to get away; it cuts into my chest like a knife—I just can't stand it. It has been that way most of the time; it gets worse right along. I have consulted almost continuously with doctors here in Billings, mostly Doctor Arnold while he was here, Dr. Feris Arnold, and

(Testimony of Carl R. Francis.)

Dr. Hanley. They told me I should not work. I have had to work. I have a bunch to keep and I am the only support. Since I got out of the Army and have been married, my income has not been large enough to support my family without work. I got married on August 10, 1920, while in vocational training. Yes, I have stepchildren. My wife had two children by a former marriage at the time I married her. I have supported them since my marriage. I have had five children since. They are from three to eighteen years of age, including the two stepchildren. The oldest girl is eighteen. Outside of my Government compensation and my wages I have had no income whatsoever. I did get a little money from my grandfather's estate at one time, about two years ago. My income has not been sufficient to support my family without working at any time since my marriage. That is the reason I forced myself to work.

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Cross-examination  
by Mr. Evans.

Yes, that is my signature on Exhibit C and on Exhibit D, and on Exhibit E and on Exhibit F, which is sworn to before Philip Savaresy, a Notary Public, in January of 1931. [35]

Mr. Evans. We offer these, not for any impeachment purposes at all, but simply to get the data more in tabulated form. It is simply the plaintiff's own admission of facts, and shows prac-

(Testimony of Carl R. Francis.)

tically identically the same work record that he had testified to on the stand. We offer Exhibits C, D, E, and F, for the files of the Court.

Mr. Smith. No objection.

Mr. Evans. I might call the attention of the jury to the fact that Exhibit C is a statement, signed by Carl R. Francis, dated May 7, 1919, to the effect that on April 30, 1919, the witness was a waiter at '\$2.14 2/10¢ per day, or about \$65.00 a month and board, in the Wide-Awake Cafe, Fort Smith, Arkansas; next, Exhibit D, dated August 15, 1923, in which he states he worked as a waiter from Sept. 15, 1922, to December 1, 1922, at \$85.00 per month, and as a waiter from December 15, 1922, to May 13, 1923, at \$80.00 a month, and as a cook from May 27, 1923 to the present time, (August 15, 1923), no wages stated; and the next Exhibit is dated February 11, 1924, and is signed by Carl R. Francis, and additional statements, or practically the same statements as to his wife and children being dependent upon him, and their wages, etc.; Exhibit F is a sworn statement covering a resume of all of his employment since his discharge from the Army and up to the time of his affidavit in January, 1931. The real purpose of the Exhibits is to show, in writing, practically the same testimony as he has given on the stand. In other words, you have the figures and dates on these Exhibits for reference, rather than trying to trust back to memory as to his testimony.



## EXHIBIT C.

C 132 785

## EMPLOYMENT STATEMENT.

State of Arkansas,  
County of Sebastin.—ss.

1. State your occupation and your average monthly earnings during the twelve months prior to entering the service: Culinary Worker  
(Occupation)

\$21.00 Per wk. & Board  
(Monthly earnings)

2. State the exact date on which you first returned to work after discharge from the service and the monthly wages or earnings received: April 30, 1919 Waiter

\$2.14 2/7 \$64.24 6/7 \$780.00 About \$65.00 and  
(day Month Year) Monthly pay or equivalent)  
Board

3. State the name and address of your first employer after your discharge from the service: Prop. Wide Awake Cafe Ft. Smith, Ark.  
(Name) (Address)

4. Have you stopped working in the place named above: No (a) If so give the date and the reason you stopped working: Will stop about 1st of next month for lighter work as this is too heavy.

5. State the name of your present employer, the date you started working for him and your monthly



wages: Prop. (Don't know name) Wide Awake Cafe. ABOUT \$65.00 wages—April 30, 1919.

6. State fully every other position and employment you have had since your discharge from the service, stating date you went to work, date you stopped and monthly wages received: At home (Employment)

X	X	None
(From)	(To)	(Wages)

7. Are you disabled for your former employment by any injury or disease received in the service: Yes (a) If so state just how Broken artery in left axilla shot through left chest.

I hereby certify to the truth of the foregoing statements.

Dated: May 17, 1919 Signature Carl R. Francis  
Address Ft. Smith, Ark.  
c/o Southern Hotel.

Sec. 25. That whoever in any claim for family allowance, compensation or insurance or in any document required by this Act or by regulation made under this Act, makes any statement of a material fact knowing it to be false, shall be guilty of perjury and shall be punished by a fine of not more than \$5,000, or by imprisonment for not more than two years or both.

## EXHIBIT D.

1. Have you been working since the date of your discharge? Yes.

2. If so, indicate in detail, kind of employment, dates of each and wages received.

(occupation)	(Commencing Date)	(Ending date)	(Monthly Wages)
Waiter	Sept. 15, 1922	Dec. 1, 1922	\$85.
Waiter	Dec. 15, 1922	May 13, 1923	\$80
Cook	May 27, 1923	to Present	

to the best of my memory.

3. Are you working at the present time? Yes.

4. If so, indicate kind of work, date of commencement. Cook —May 27, 1923.

5. Present employer E. Shellings Shellings  
(Full name) (Address)

Cafe.

6. Have there been any changes during the past six months in the conditions regarding your dependents, such as death, divorce, separation from your wife or birth of children? Yes.

If your answer is "Yes," indicate changes in the following space: Birth of child born May 5, 1923.

I am now receiving compensation in the amount of \$20.00 a month, including allowance for dependents. The following people are now dependent upon me and have been so ever since I submitted evidence of their dependency, and I contribute regularly to their support:

Name	Relationship	Age	Annual Income
Florence Francis	Wife	31	X
Dorothy Smith	Step-child	9	X
Meredith Smith	Step-child	6	X
Nella Francis	Child	2	X
Allie Cly Francis	Child	3 Mo.	X

I hereby certify to the truth of the foregoing statements.

Dated Aug. 15, 1923

Claim number C-132 785

Signature Carl R. Francis  
Address 3916 3rd Ave. S.  
Billings, Mont.

C-20 Rev. [37]

### EXHIBIT E.

1. Have you been working since the date of your discharge? Yes.

2. If so, indicate in detail, kind of employment, dates of each and wages received.

(Occupation)	(Commencing date)	(Ending date)	Monthly wages)
Waiter	Dont know	at Ft. Smith, Ark.	60 dollars
"	Sept. 1st 1919	Feb. 5 1919	80 "
Rehabilitation (cook and waiter)	Feb. 8 1919	May 19, 1921	at govt. pay
Luzon & metro- politan	Sept. 15, 1921	Oct. 5, 1923	80 to 120 dollars

3. Are you working at the present time? Yes.

4. If so, indicate kind of work, date of commencement. Cook. Jan. 5, 1924 to present time.



The above dates and wages are to the best of my memory.

C-20 Rev. [38]

EXHIBIT F.

United States Veterans Bureau  
Adjudication Service  
Form 535 Oct., 1929.

INDUSTRIAL HISTORY AFFIDAVIT  
(CLAIMANT)—INSURANCE.

In support of my claim for monthly payments of insurance, on account of permanent and total disability, I make the following statements as to my industrial history as true to the best of my knowledge and belief:

A—PRE-WAR OCCUPATIONAL STATEMENT

State your occupations and your average weekly earnings during the twenty-four months before entering the service. If you were at any time during these twenty-four months engaged in more than one occupation make separate statements in naming these occupations:

1. Occupation—Student.

Employer's name and address:

At home and in School, Western Business College, Shawnee, Okla.

(If self-employed, write "self" in this space)

From August, 1915 to January, 1916.

Usual number of hours worked per day.....

Average weekly wage or earnings, \$ none. Did you work steadily?.....

My duties in this occupation were Student.

2. Occupation Steel work.

Employer's name and address Reeves Brothers, near Cushion, Okla.

(If self-employed, write "self" in this space)

From February, 1916 to April, 1916.

Usual number of hours worked per day ten.

Average weekly wage or earnings, \$5.00 per day. Did you work steadily? Yes.

My duties in this occupation were Steel construction work.

3. Occupation Farm and harvest hand.

Employer's name and address Mr. Michaelson, near Larnard, Kansas.

From May, 1916 to July, 1916.

Usual number of hours worked per day. From sunrise to sunset.

Average wage or earnings. \$75.00 per month and board and room.

Did you work steadily? Yes.

My duties in this occupation were General farm and harvest work.

4. Occupation Farm and harvest hand.

Employer's name and address E. W. Arnold, near Larnard, Kans.

From August, 1916, through October, 1916.

Usual number of hours worked per day. From sunrise to sunset.



Average wage or earnings \$5.00 per day and board and room.

Did you work steadily? Yes. My duties in this Occupation were? General farm work and harvest hand.

5. Occupation Cook and waiter.

Employer's name and address Coney Island Pool Hall, Tulsa, Okla.

From November 1916, through December, 1916. Usual number of hours worked per day ten hours per day Average wage or earnings \$3.50 per day and board and room. Did you work steadily? Yes. My duties in this occupation were Working at lunch counter, waiter and cook.

6. Occupation Cook. Employer's name and address—Busy Bee Cafe, Eldorado, Kans., From January, 1917 through March, 1917.

Usual number of hours per day—ten.

Average wage or earnings \$35.00 per week and board.

Did you work steadily? Yes. My duties in this occupation were—Cook. [39]

7. Occupation—Waiter and cook. Employer's name and address—Peterson's Cafe, Miles City, Montana, from April, 1917 to August 1917.

Usual number of hours worked per day—ten.

Average wage or earnings \$35.00 per week and board.

Did you work steadily? Yes. My duties in this occupation were—waiter and cook.

B—POST-WAR OCCUPATIONAL  
STATEMENT.

1. What has been your occupation since your discharge from military service? Restaurant work.

2. Name and address of each employer and period of employment with each (If self-employed, write "self" in this space)

(a) Name and address of employer—Wide Awake Cafe, Forth Smith, Arkansas, from May 1st, 1919, to June 15th, 1919. Usual no. of hours per day—ten. Average wage—\$10.00 per week. Duties—waiter.

(b) Name and address of employer—Albin Cafe, Cheyenne, Wyoming, worked five days in August, 1919. Usual No. of hours per day—ten. Average wage—\$3.00 per day. Duties—cook and waiter.

(c) Name and address of employer—Jim Peterson's Cafe, Miles City, Montana. About three weeks in September and October, 1919. Usual No. of hours per day—ten. Average wage—\$21.00 per week. Duties—cook and waiter.

(d) Name and address of employer—Ingham Cafe, Miles City, Montana. From about November 1st, 1919 to January 15th, 1920. Usual No. of hours per day—ten. Average wage—\$21.00 per week. Duties—waiter.

(e) Entered vocational training, February 9th, 1920 to September 1st, 1922.

(f) Name and address of employer—Shelling's Cafe, Billings, Montana, December, 1922 and Jan-

uary, 1923. Usual No. of hours per day—ten. Average wage—\$25.00 per week. Duties—cook.

(g) Name and address of employer—Luzon Cafe, Billings, Montana, August, 1923 to September 30th, 1923. Usual No. of hours per day—ten. Average wage—\$21.00 per week. Duties—waiter.

(h) Name and address of employer—Ferndale Cafe, Billings, Montana, from January 3rd, 1924, to August 6th, 1926. Usual No. of hours per day—ten. Average wage—\$32.50 per week. Duties—Cook.

(i) Name and address of employer—Metropolitan Cafe, Billings, Montana, from September 10th, 1926, to September 20th, 1926. Usual No. of hours per day—ten. Average wage—\$21.00 per week. Duties—worked in Kitchen.

(j) Name and address of employer—New Bungalow Cafe, Billings, Montana, from September 21st, 1926 to October 30th, 1926. Usual No. of hours per day—ten. Average wage—\$32.50 per week. Duties—cook.

(k) Name and address of employer—Northern Hotel, Billings, Montana, from March 17th, 1927 to May 24th, 1927. Usual No. of hours per day—ten. Average wage ..... Duties—Cook.

(l) Name and address of employer—Ferndale Cafe, Billings, Montana, July 11th, 1927 to present time. Usual No. of hours, ten. Average wage—\$32.50 per week. Duties—cook.

3. Usual number of hours worked per day .....  
average weekly wage ..... [40]

4. Has your physical condition been responsible for loss of time from employment? Yes. If so, to what extent? Explain Been able to work about half time on account of physical condition.

5. Have you been able to do your full share of work and compete with men employed in the same occupation? No. If not, state reasons which permitted your retention in employment—Kept on through sympathy and the fact that I was an ex-soldier.

6. If self employed furnish the names and addresses to two or more disinterested persons who have knowledge of the facts:

Not self-employed.

7. I make the foregoing statements with full knowledge of the penalty provided for making a false statement as to a material fact in a claim for insurance.

State of Montana,  
County of Yellowstone.—ss.

S/ Carl R. Francis,  
(Signature of affiant)  
319 N. 23. Billings, Mont.  
(Address of affiant)

Subscribed and sworn to before me this 20th  
day of January, A. D. 1931.

[Seal] S/ PHILIP (?)  
(Signature of officer administering oath)  
Notary Public for the State of Montana, re-  
siding at Billings, Montana.

My commission expires November 17, 1933.

PENALTY—That whoever in any claim for  
compensation, insurance or maintenance and sup-  
port allowance, or in any document required by  
this Act, or by regulation made under this Act,  
makes any sworn statement of a material fact know-  
ing it to be false, shall be guilty of perjury and  
shall be punished by a fine of not more than \$5,000  
or by imprisonment for not more than two years,  
or both. (Sec. 501, World War Veterans Act,  
1924.) [41]

(Testimony of Carl R. Francis.)

(Plaintiff continuing). When I got out of the  
Army, in December, [42] or about the 1st of Jan-  
uary, 1919, I went to my father's home. He lived  
at that time at Walls, Oklahoma. I was there  
about six months, but I was not in Walls during



(Testimony of Carl R. Francis.)

all that time. My father moved a short time after to Talihina, Oklahoma.

The first work I did was along in April of that year in Arkansas. I imagine that is right, that I worked a total of about 4½ months during the year 1919. I wouldn't know exactly. I was off seven months and that included the first four that I was out of the Army—in other words, after I started to work the first of May, I lost about three months and worked about four and one-half or five months. That is approximately correct. I was working in 1920 at the time I went into Vocational Training and I only worked a short time and a period in between that time.

I went to Bozeman on or about February 9, 1920, and remained in training during that year.

To go back to 1919, if I remember, I got about \$10.00 or \$12.00 a week while in Arkansas, and a few days at Cheyenne, Wyoming at about \$3.50 per day—the best I can remember. Yes, sir, that is about right, that in that five months I earned about \$350.00 and my board. In 1920 I received a maintenance allowance from the Government while in Vocational Training. Up until the time I was married that was \$80.00 per month—that is, while I was in Vocational Training. I received \$80.00 a month from February 9th until in August, when I was married. After I was married I don't remember my rate of pay; it was \$100.00, I imagine, possibly \$115.00. If the records show that on Au-



(Testimony of Carl R. Francis.)

gust 10th I began to receive \$152.50 a month as training pay, that is correct. I don't remember. I received \$80.00 for about six months and \$152.50 or approximately about \$1400.00 in 1920 as maintenance allowance.

In 1921 I lost some time from my training—such time as I lost from sickness and in changing vocational objectives and finding places for me. That is while I was in training. I [43] did not suffer any deduction from this vocational allowance. The pay was fixed. I was not in the hospital during any of that time. I was at home sick in bed a few days at a time, and probably as high as a week or more. Yes, that is about right if your figures suggest that I earned about \$1890.00, or rather, there was paid to me about \$1890.00 during 1921 as training pay.

In 1922 I testified I left vocational training and began work. I was at the Luzon Cafe a short time and the wages were \$21.00 a week. At Shelling's the wages were \$25.00 a week. If I made a statement that I received \$35.00 a week at the Luzon, together with my tips, while a waiter there, I don't remember it. In fact, I know I didn't. I may have made a statement to the training officers to the effect that I preferred to return to the occupation of waiter, rather than cook; I don't remember. Although trained as a cook, I did take the occupation of waiter at the Luzon Cafe at that time because I took what I could get at that time. That is

(Testimony of Carl R. Francis.)

probably correct that with my wages and training pay in 1922 I earned about \$1800.00. While I was in training, however, I didn't receive any pay except from the Government.

In 1923, the year after I was out of training, I don't believe I did anything; I can't remember of anything, unless possibly a day or two from place to place. I did not take any trips that I remember, or anything of that sort. I believe I made one trip into Wyoming, I think for two or three weeks, something like that. I don't remember that I worked more than two months during that year. If I did, if you will mention something to recall it to my mind—the best I can remember is that I worked only at the Luzon a short time—a part of August and September—I imagine through Fair time—just through Fair time. I was not in the hospital at any time during 1923. I have been sick and at home quite a bit of the time. I do not recall any definite times in 1923 when any doctors treated me while laid up at home, but I was to see doctors pretty nearly continuously; that is, maybe once or [44] twice a week, or maybe once every two weeks during that time. I couldn't tell you what I earned in 1923—not very much, about \$125.00 a month in those two months I imagine. I think \$250.00 for my earnings that year would be about right. During this period, while in training, I was receiving compensation, and while not in training, just that fixed by the Compensation

(Testimony of Carl R. Francis.)

Board. This compensation was paid to me by the Government on account of gunshot wound which I suffered.

In 1924, January 3rd, I started working for the Ferndale Cafe, and I earned \$32.50 a week at that time. My duty was that of chef and cook. I worked the full twelve months of 1924 for the Ferndale outside of possibly a few days. In 1924 I earned about \$1825.00 for that twelve-months' work, that is approximately correct, and in 1925 I worked all through 1925, and I should judge earned about \$1825.00 during that year.

In 1926 I left the Ferndale, having worked there about nine months—I don't know the exact number of months—about eight or nine months. I was off then for three months in 1926, and I earned about \$1200.00 during 1926. To the best of my recollection during those three months I was not working I was in Billings. Before I left there, I made a trip to Red Lodge, with the Y. M. C. A. boys and spent ten days with the boys and was laid up for about two weeks afterward, but that was before I was discharged from the Ferndale. In 1926 I believe I was at the New Bungalow and it was the New Bungalow that built higher tables for me.

If the records show that I worked about eight months and was off about four, and computation of wages would indicate that I earned about \$1100.00 in 1927, that is about correct, if that is

(Testimony of Carl R. Francis.)

my testimony. I was at the Northern Hotel in 1927 and my wages were \$110.00 or maybe \$120.00 a month. I am not sure. I believe that Mr. Shea's records show \$110.00. I was under the impression it was \$120.00.

Beginning in 1927, in July, on July 11th, I went back to the Ferndale Cafe again. My wages there were the same as [45] before, \$32.50 a week. As a chef, I was responsible for all the twenty-four hours, but I usually worked from six or seven o'clock of a morning until three in the evening. If I wasn't through, I had to stay later. That made about a ten-hour day unless I could cut it down by having things in shape to do so. During 1927, 1928, 1929 and 1930 I made approximately \$1685.00 a year. I did not have much time off during those years, only at times, without I would be sick maybe. Of course I don't know how often that would be, and in the afternoon, if I would give out and some one was available at all, I would pay them myself, so that I could go home. That would happen quite often, when I didn't feel well. There were no deductions from the pay. I would have no way of getting at how much I paid out in that manner. I have witnesses who can testify they substituted for me. I can't say as to how much time they can testify to; I don't know. It was just when I felt bad and some one would be there. Often I just had to stick it out the best I could. I would say that I hired a substitute for as much as a month of the whole year,



(Testimony of Carl R. Francis.)

because I usually had to give them from a dollar to two dollars, or possibly three—very often two dollars for an afternoon, to finish up. I can possibly name any number whom I hired for that purpose. Their present cook there now, he has served a number of time. His name is Charlie Keyes. I have no way of knowing how much time I paid for out of my own pocket for help during that three years. I haven't any definite figures on it.

I have not been treated by any doctors during the past four or five years, but I go to them to see what can be done. The doctors were Dr. Arnold, as long as he was here, and Dr. Hanley here, that is outside of Federal doctors and the regular Board, the routine that you go through, and dentists if you want to take them in. In the twelve years from the time I got out of the Army until a year ago I would say I spent four or five months in a hospital or in bed, laid up, on account of my disabilities—possibly three or four in the [46] hospital, but I spent a great deal of time in bed at home. I couldn't say how much of that time I spent in bed at home was twenty-four hours at a stretch, but when I get off shift, I go home and to bed, unless there is something I must stay up for. I don't undress and lay down for two or three hours; I nearly always go to bed. I can just guess at how much time in bed during the working hours I spent confined in bed, so that I was unable to go to work at all. I would say during the time I was at the hospital, six or

(Testimony of Carl R. Francis.)

eight months. That is a guess now. I never gave it any thought. I wouldn't know how to get at that.

Q. I have computed that in that twelve years, you lost a total of 25 months' time, and according to your testimony, that you had spent possibly five or six months of that 25 months in bed. Is that about correct?

A. Possibly. I had never given it any thought and can't say positively. I could say better if I could check it over. That is my estimate according to the reference you have.

Q. Now then, I compute that during that twelve years, you worked practically ten years of that time, or one month less than ten years of the twelve, assuming that you lost twenty-five months' time from your work in the twelve years, and that that included the time you were in vocational training, and that you attended the job more or less regularly, and the total earnings, I compute, would be between \$15,000.00 and \$16,000.00 that you earned, and that includes the \$1890.00 a year that you received as vocational training pay. Would that be approximately correct for the twelve years?

A. Yes.

(Plaintiff continuing): I have been examined by doctors of the United States Veterans Bureau at times, so many times that I can't remember. It has been a continuous thing until I was put on a permanent list. It is customary to examine me every year or two, to determine the degree of my disa-



(Testimony of Carl R. Francis.)

bility, for compensation purposes. I haven't been called in now for two or three [47] years I guess.

Before I went into the Army I had been in school, and I worked in a hotel for my board while in school, and when I got through school, I could earn more by taking the job of second cook, in the place where I was working for my board, so I did that. In January to March, 1917, and in April to August, 1917, before I went into the Army, I worked at \$35.00 a week as a cook, in Miles City and El Dorado, Kansas, so that just before I went into the Army I was a cook, earning \$35.00 a week at that time. I wasn't very old and I had done a lot of different things. I followed the oil fields and the harvest fields.

I do not claim to have paid any premiums on my insurance after the premium for March, 1919, was due. Unless my permanent total disability at this time is directly caused from injuries received while the insurance was in effect I admit that the insurance lapsed.

I said that Dr. Feris Arnold and Dr. Hanley treated me and advised me. They told me that I couldn't work, that it would be dangerous to my life or health to do so—that I shouldn't work. I don't know any reason for that advice.—on account of my health, nervous condition, and such like. They don't usually tell me anything much; they just tell you what you should do, or possibly give you a prescription to have filled and tell you how to take it.

(Testimony of Carl R. Francis.)

While I was in vocational training in Billings I believe was the first doctor I saw, outside of the board doctors. I was called in as a regular at that time, while I was in training, and Dr. Arnold was the first doctor I had in Billings, and possibly a dentist. Dr. Hanley advised me also in that fashion. I don't remember any others.

Redirect Examination  
by Mr. Smith.

At the time when I first found out I was wounded, there was not a whole lot of outside bleeding. My hand was [48] wet after I put it inside my shirt, and I spit some blood—not until after the infection set in, and the blood vessels got so weak that one of them broke, and the boys—that is the boys in the ward—told me that when I was on the table they pulled this vessel out and tied it with cat gut, each end. The orderlies in the hospital told me. At the time of being wounded, there was not a whole lot of outside bleeding. I spit blood, and I was weak, awfully weak. I lost the use of my side; I couldn't raise my arm, and they sent me back, and I thought I would be all right, and by the time they had me back I was all in at the dressing station. A great part of the time I was in the hospital I spit blood, until I came to the States. I don't remember any after coming from Des Moines. I testified this morning that there was pus in this wound. It seems to me like it continued the full

(Testimony of Mrs. Carl R. Francis.)

time until after I came back to the States. It continued until about two, three, or four months before I was discharged. The wounds really didn't close until about the time I was discharged. I believe I landed in October of 1918 at Newport News, Virginia, and then I went to Des Moines, Iowa. It must have been about a month that I was in the States before I was discharged because that was in November, and I was discharged in December,—about a month and a half. I do not have the full use of my left arm at the present time. It is not possible for me to raise it as high as the other one. I haven't the full use of it. (Witness stands and shows how far he can raise arm.) It hurts in here (indicating).

Q. Can you touch the top of your head with that arm?

(Witness attempts to, but cannot.)

Mr. EVANS.—Mr. Francis, will you just put both arms up, for comparison purposes. (Witness complies with request.) [49]

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### TESTIMONY OF MRS. CARL R. FRANCIS

on behalf of the plaintiff:

I am Mrs. Francis, the wife of the plaintiff. We were married in Minneapolis on August 10, 1920. I had two children at that time. Mr. Francis and I have had five children since then. I have been

(Testimony of Mrs. Carl R. Francis.)

with Carl practically all the time since our marriage. I haven't been down at places where he worked. My association with him has been in our own home. In the evenings when he comes home from work he is always dreadfully tired and worn out. This has continued pretty much all the time since our marriage. As soon as he would come home he would usually go and lay down. That was his regular habit. He would lie around that way perhaps an hour. The rest of the evening maybe he would get up and read the paper and perhaps he wouldn't even do that. He usually retired about 8:30, and he would stay in bed until the next morning.

We don't go out a great deal, perhaps to a moving picture show every two weeks.

Yes, I do know that he had pains and catches in different parts of his body. I know he gets a catch in his side. His left arm bothers him. I can't say exactly how often he would be troubled with the pain in his left side. Sometimes every few days and sometimes two or three times during the day, and then again maybe it won't come on for weeks. He has suffered from this ever since our marriage, and he is worse now than when we were first married. He usually goes to pieces when he gets this pain in his side. I am so frightened, I can hardly explain. It seems as though his heart stops beating for a minute or two. When he gets this pain, he always likes to lie on his stomach. It would seem

(Testimony of Mrs. Carl R. Francis.)

as though it would just be a few minutes until he got some relief, but it would be an hour before he would be able to get up. He has never done any work around the house. He isn't able to do it and so I don't ask him. I have wanted to call a doctor when he has had these pains or spells, but he would say it would be gone by the time [50] the doctor arrived. I have urged him to quit work and he would reply that he can't. He feels that he must work to support the family. When he has these pains in the side and lies down, I really think he knows what is going on, but seems to be in a kind of daze.

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Mr. EVANS.—No cross-examination.

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#### TESTIMONY OF EDWARD M. SHELLING

on behalf of the plaintiff:

My name is Edward M. Shelling. I am a resident of Billings. I am acquainted with Carl Francis. He worked for about two months. He testified he worked for me in December, 1922 and January, 1923, and that coincides with my recollection. I was running a restaurant at that time. He was fry cook for me. He was a very willing worker.

During the first week I didn't know there was anything wrong with him, but after a while I



(Testimony of Edward M. Shelling.)

thought he was beginning to slack up, and I asked him about it, and he said he wasn't feeling his best. At night he was supposed to clean up and take the dinner things off—certain amount of cleaning up to do, and he had to call on the dishwasher in order to get through. That was a portion of his work. He told me about not being able to lift anything heavy the second or third day after he came. He was supposed to lift a heavy sack and wasn't able to do it. After that I always had a man to help him.

Yes, I noted a difference between the time when he first went to work and after he had been on the job several hours. In the afternoon I wouldn't be there and there was a lot for him to do. At supper time he was supposed to have the range, and I always helped him. I didn't notice that there was anything the matter with him, but one day he said, "I am not feeling good." I didn't know he was hurt, thought maybe he was just feeling rather sick. Whenever we had a big crowd, he would almost pass out. We would have to help him to the door [51] and then after he had revived, he would get along pretty good. During this time I would do his work. Eventually I had to let him go, as I was trying to turn out the pastry and it took too much of my time to help him, and I thought there was no use fooling with him, that I might just as well get a man who could do the work.

I have been a restaurant man forty years.



(Testimony of Edward M. Shelling.)

At times this man was just as good as anybody, but if a big crowd happened to come in, he would be all in. He couldn't handle it. No, I wouldn't figure he was capable of handling the job by himself.

Cross-examination  
by Mr. Evans.

Mr. Francis worked for me during the month of January, 1923, and probably before Christmas of 1922. He worked almost two months—I couldn't say exactly. I knew of him between February, 1923 and August, 1923. I saw him. He was around town. I think he worked a week at the Metropolitan. I think that is where he worked Fair week. What he did the other times I don't know. That was when I found out he got compensation. I didn't see how he could support a family otherwise. I paid him small wages. Once when I met him, I asked him if he had a job, and he said: "I would not be able to hold a job if I had it." I have known him since then all the time. I don't know about his being better or worse than since or before 1923. He doesn't seem to be able to hold a job since he worked for Mr. Loomis.

I saw him in the Ferndale. He had had several afternoons off because he wasn't feeling good. The testimony was that he worked for several years there and I observed him during those years. Some of the employees that worked for the Ferndale

(Testimony of Edward M. Shelling.)

worked for me afterwards, and I asked them how Francis was getting along, and they said: "When he's all right, he is all right, [52] but when he has those sick spells, he's good for nothing." I can't say that there is much difference between his condition in 1923 or 1928 to 1929. I noticed a big difference between the first and last few weeks that he worked for me. I wouldn't have kept him but for his family. Mr. Francis didn't tell me he was a discharged soldier.

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#### TESTIMONY OF FRANK LARSON

on behalf of the plaintiff:

My name is Frank Larson. I was the manager of the New Bungalow Cafe in the fall of 1926. I am acquainted with Mr. Francis. He worked for me in the fall of 1926, about five or six weeks I should judge. He was a good cook and he knew his business.

I don't remember exactly what Mr. Francis' shift was when he worked for me, but from around six to seven in the morning he went to work, or a little before that, and worked until about one, and then from about nine to ten in the evening. When he first came to work in the morning, you wouldn't want a better man; later on, when he got tired, you would think he would die on the job, until along about seven or eight, he wasn't able to keep track of the orders, and a cook wouldn't last very long in

(Testimony of Frank Larson.)

any kind of a restaurant if he couldn't keep track of his orders. I didn't notice anything else along this line. The main thing I wanted was to have him get his orders out. He was there about six weeks and then I had to turn him loose. He couldn't handle the job.

I have been in the restaurant business, with the exception of three months, for twenty-five years. I would say this man was able to handle the job for about an hour all right. He was not capable of handling the job for the ordinary shift that was required of him in our place.

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Mr. EVANS.—No cross-examination. [53]

The COURT.—Do you mean he was not physically able to take care of the orders? Do you mean that because of his condition physically, he seemed to die on the job?

WITNESS.—I mean that at first he was all right, but was worn out after he had been there an hour or so.

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### TESTIMONY OF T. C. PETERSON

on behalf of the plaintiff:

My name is T. C. Peterson. I am acquainted with Mr. Francis. I was in charge of the Northern Hotel kitchen between March 17, 1927, and May

(Testimony of T. C. Peterson.)

24, 1927. Mr. Francis worked for me at that time about two months. He was working under me. He worked on the same shift with me.

During the time he was there I knew he had dizzy or fainting spells. About the first three days he was there, he had a fainting spell. I helped him out to get some fresh air, and probably five or six times during the first two months he was there he had to go out to get fresh air. The last night he was there, I had to carry him to the door. He just fainted, and I had to carry him out to the door. When he had these fainting spells it would be about two hours before he could come back on the job. The last time he never did come back on the job. I got a taxi and sent him home, and the next morning he didn't show up. We had a banquet on at the time. There was some extra work at the time. With reference to Mr. Francis' ability to lift some of the pots and other things he had to lift as a cook, he was useless—couldn't do it. We always had two extra cooks who would take care of that.

When he left there as far as I know he went to the hospital at Helena.

While in my employ he was not ever able to perform the duties of his position. I kept him on as long as I did because his knowledge in the kitchen was pretty good, and we couldn't get a man who would get out and take care of the [54] orders—I mean cook the orders correct. We had to get along with him as long as we could. It was just due

(Testimony of T. C. Peterson.)

to the fact that I couldn't get any one to take the job. I never took him back when he came back from the hospital.

Cross-examination  
by Mr. Evans.

It was sometime in March, 1927, when he first came to work for me, and it was probably May when he left. It was about two months. I was the head chef myself. I was drawing \$120.00. I had one or two other cooks. We paid one \$120.00, one \$110.00 and one \$80.00. I paid Francis \$110.00. The one I paid only \$80.00 was a pastry cook, and he got only \$80.00.

As far as I know when Francis finally left my employment he went to the hospital at Helena. These spells I testified to were regular throughout his whole employment. I couldn't say whether they seemed to get better or worse as the employment continued. He had one when he started and one the last night he was there and some in between, so I couldn't say. When he left he was sick enough to go to a hospital and I don't know where else he could have gone.



## TESTIMONY OF JAMES BUCKLEY,

on behalf of the plaintiff:

My name is James Buckley and I reside here in Billings. I am acquainted with Carl Francis. I have known him about nine years, a little over. I have worked with Mr. Francis several times.

The first time I worked with him at the Ferndale Cafe, that is here in Billings. I went to work there in May, 1925, and worked there until April, 1926, about 11 months. Mr. Francis was working there during that time. He was chef. I was washing dishes. We worked on the same shift part of the time. While he was acting as a chef he was able to perform his duties, but as a cook, he did not. He couldn't do the [55] lifting, and would get weak spells or fainting spells, etc. and would have to go back and sit down, and when I was on the shift with him, I would hold up his end until he came back. As a cook he was supposed to lift large pots, and there were sacks of flour to be emptied, and such like. I don't know about quantities; they didn't buy in such large quantities. I did the heavy lifting while on shift. That was not part of my job, but was really the cook's job.

Referring to the spells, I wouldn't say he fainted or went clear out. If the work was a little too heavy, he just went back and sat down and stayed until—I couldn't say exactly the period—sometimes a few minutes and sometimes longer, and then he would take up the work again. I don't know a thing about how often they would come on him—



(Testimony of James Buckley.)

maybe every four or five days or a week, and often sometimes for several days he had them right along. There was no set time during the day when they would come on—well, maybe in the middle of the morning, after the work got a little heavy. I would do his work during the time he would be sitting down. I jumped in and did it, but that was not part of my duties. I did it because Carl needed the work; he was a good fellow and he had a family, and he needed to do it to keep his family going.

I worked with him at a later time. I came back there in 1930, from Great Falls, and went to work there at the Ferndale again from June, 1930, to January, 1931. Mr. Francis was working there at that time. I did not work on the same shift with him at that time. I worked from 11 to 7 and Carl came on at 6. I would be there an hour in the morning with him. He never did any lifting. We didn't expect him to. Everybody did the lifting for him. It was just everybody's work. I always did make a special effort to do this work before I would leave, and everybody who worked that shift did. If there were any stocks to put away, I always did it, so Carl wouldn't have to do it. It was usually left to the day man. [56] His condition was worse from the first time I worked with him.

After I left there in January, 1931, I worked with Carl Francis down to the sugar factory. That was during the sugar campaign, this last fall. We

(Testimony of James Buckley.)

started in together and worked that way for about six weeks and then I sold out my share and worked for wages. We worked as partners. While Carl was on the job I did all the heavy lifting. I never saw him have a fainting spell, but one, and that was the worst one ever. We were fixing the stove and he started to lift it and he fell down. He fell back and sat down there, must have been forty-five minutes or an hour, back on a box. He doesn't make any complaint. I never asked him any questions because I knew his condition.

I have worked around restaurants eleven years. I would say that any time I worked with Carl that he was not able to perform the duties of a cook without having some one help him.

Cross-examination  
by Mr. Evans.

Mr. A. M. Loomis is the proprietor of the Ferndale and he is in Billings at this time. He works in the front end of the cafe. During the time Francis and I were working there, he worked at the table in the front. He had the whole supervision of his help, could see what was going on at all times. I never heard Mr. Loomis find fault with the work of Mr. Francis, and Francis was working there before I came to work and after I left there.

## TESTIMONY OF MRS. VELMA DUGAN

on behalf of the plaintiff:

My name is Mrs. Velma Dugan and I reside here in Billings. I know Carl Francis and have for about ten years. I worked with him at two different places, first at Shellings, who testified here. It was during the period Mr. Shelling testified to. Carl was cooking there at that time. I was waiting table. I noticed [57] the way he was able to do his work as cook there. Part of the time he did it alright, but he couldn't remember his orders. He couldn't remember more than two or three orders at a time, and there were several of us girls on at the time. It was impossible for him to lift up any platters, and there is lots to do. He couldn't do any of the heavy lifting. Bennie Peyton, the dishwasher, did most of that for him. The heat certainly did affect him. For about two hours he would be all right and then he would be all in, could hardly finish the afternoon. I have seen him lots of times in fainting spells, and he would either go to the door or lay down on the meat block. These spells would continue sometimes fifteen minutes or half an hour. Anyone who had an order at such times would go out and fix it ourselves. These spells seemed to come during the heat or a rush. He couldn't stand that. I worked with him the next spring at the Ferndale, the spring of 1924. We worked together down there four or five months. His condition at the Ferndale compared to at Shelling's was lots worse. We all helped him

(Testimony of Mrs. Velma Dugan.)

with his work down there. We cooked lots of orders for him that he should have done. He would probably be sitting down and resting, and I would go and cook the order myself. He couldn't do the heavy lifting, same as at Shelling's. It seemed that he had spells lots oftener than at Shelling's. It was not part of my duty to go into the kitchen and cook.

Cross-examination

by Mr. Evans.

I never heard of Mr. Loomis complaining of his work. He did continue to work there after I left. Mr. Loomis is in town now.

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TESTIMONY OF MRS. FLORA SUMMERS

on behalf of the plaintiff:

I am Mrs. Flora Summers and I am acquainted with Mr. Francis. I have known him about seven years. I have worked at the same place that Mr. Francis has at the Ferndale Cafe [58] for about four years. It has been testified to that he worked there on two different occasions and I worked there both times and I was there when he worked there the last time. I was on the same shift that he was. I observed that he couldn't lift heavy pots and weights at all. I have helped him myself. Whenever he thought I couldn't help him he would leave

(Testimony of Mrs. Flora Summers.)

it for the next party. We generally had a man working there in the afternoon. I was washing dishes. I remember that Mr. Francis had trouble about forgetting orders. He complained quite a bit about being sick and having to rest until he got better. That would be quite often. When that came on I would do what I could until he got to feeling better and could do it himself.

Cross-examination  
by Mr. Evans.

Mr. Loomis was the proprietor of the Ferndale Cafe. He is in town now. I never heard him complain of Mr. Francis' work. They never discussed that with the help.

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TESTIMONY OF J. H. DANIELS

one behalf of the plaintiff:

My name is J. H. Daniels and I am Secretary of the Cooks and Waiters Union here. I have had that position since August, 1918. I know Mr. Francis and have since March, 1921. I have had occasion to observe Carl's work since 1921. I would go around at places perhaps once a week and see him working when he was on the job. It was one of my duties as Secretary to go around. I have quite often observed his manner of doing his work on these visits. I have noticed that the assistants,



(Testimony of J. H. Daniels.)

such as dishwashers, would have to help him with his work, and with lifting, such as that, and I would probably remain there ten or fifteen minutes sometimes, and I would notice that he couldn't remember orders very well. I have had several jobs for him in the last year, but couldn't keep him on them. It seems he wasn't able to handle them since leaving the Ferndale. I knew about him when he was working at the Luzon and the Metropolitan, and I wouldn't recommend [59] him for those places—the work is too heavy for him. The work at the Ferndale is an easier place to work. There are not so many orders coming in there. It is not as large as the other places, considered what you might call a smaller job. I would state that I have tried to put him to work at Byron's Cafe, and I went to Mr. Byron when Carl wasn't working and told Mr. Byron just his condition, that he wasn't very strong, but Byron said that he would cut the meat and do the heavy work of the kitchen and he would probably be able to hold the job in that way, and he worked a couple of days there and finally Byron went on a trip to Bozeman and left Carl alone and the work was too much for him.

Q. Mr. Daniels, will you give the reason why Carl was able to hold the job at the Ferndale and not at the Byron Cafe and the other places he was obliged to leave?

Mr. EVANS.—Objected to as not the best evidence—calls for conclusion of the witness.



(Testimony of J. H. Daniels.)

The COURT.—He has already said it was a much easier place to work and has covered it now.

Mr. SMITH. All right. That is all.

Cross-examination  
by Mr. Evans.

Yes, I did say I was Secretary of the Union and in that position it is my duty to find jobs and place a man at work.

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Mr. SMITH.—At this time we wish to offer the deposition of Ferris Arnold, whose deposition was taken on stipulation of counsel. Do you wish to look it over, Mr. Evans?

Mr. EVANS.—No, you may read it and it will be all right, or perhaps I had better ask the questions and you may read the answers from the deposition.  
[60]

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#### DEPOSITION OF DR. FERRIS ARNOLD

read on behalf of the plaintiff:

My name is Ferris L. Arnold, age 39, address Long Beach, California. I am a Doctor of Medicine. I am a Medical Doctor, a graduate of Loyola University, Chicago, 1915 and have an M. D. degree. I am licensed to practice my profession in the States of Illinois, Montana and California. I practiced from 1915 to 1926 at Billings, Montana, in

(Deposition of Dr. Ferris Arnold.)

general practice; from 1926 to 1928 at Chicago, Illinois, eye, ear nose and throat; from 1928 to 1932 at Long Beach, California, Eye, Ear, Nose and Throat.

I am acquainted with Carl R. Francis, the plaintiff, and he consulted with me professionally at Billings, Montana, in 1921 to 1926. These consultations consisted of frequent office consultations and examinations, also house calls and consultations. These consultations and physical examinations of Carl R. Francis were of such a nature that I was familiar with his physical, mental and nervous condition during all the period of my consultations as above stated. Referring to the first consultations in 1921 they did include an examination of the said Carl R. Francis to ascertain his physical, mental and nervous condition, and my diagnoses were: 1. Chronic myocarditis; 2. Enlargement of Heart; 3. Chronic Nephritis; 4. Chronic respiratory infection; 5. Neurosis and extreme mental despondency; shortness of breath, pulse 120, 140 on exertion, low specific gravity urine; rales in chest. Casts and albumen in urine. Chronic cough, temperature from 100 to 103; weakness and inability to do his work. After his first consultation in 1921 Carl R. Francis consulted me frequently, sometimes daily for weeks at a time. These consultations subsequent to 1921 were all of such a nature and character that I was familiar with his physical, mental and nervous condition at all times up to my last consultation in 1926.

(Deposition of Dr. Ferris Arnold.)

Up to the time of the last consultation in 1926 his mental condition grew worse, felt as if he could never work or get well again. Physical condition grew worse, was [61] unable to work for long periods of time because of weakness.

From my consultations with and examinations of Carl R. Francis I did form an opinion as to the cause of his condition as heretofore testified to, and that opinion is that he had a severe injury and shock during the war, together with exposure and extreme fatigue which brought on his physical infirmities and caused him to become a psycho-neurotic. In my opinion the physical, mental and nervous condition which I have heretofore described dated back to the time that Carl R. Francis was wounded in action in France. I consider that he was permanently and totally disabled in accordance with the Treasury Department definition as read to me at the time of my first examination and consultations in 1921, said Treasury Department definition of total and permanent disability being "any impairment of mind or body which renders it impossible for the insured to follow continuously, any substantially gainful occupation without seriously impairing his health, and when it is of such a nature as to render it reasonably certain that it will continue through the life time of the insured." In my opinion such total and permanent disability dated back to the date that Carl R. Francis was wounded in action. In my opinion such total and permanent disability continued to the time of my

(Deposition of Dr. Ferris Arnold.)

last consultation with Carl R. Francis in 1926. In my opinion it will continue throughout the lifetime of said Carl R. Francis. I know that Carl R. Francis worked and followed an occupation as restaurant cook during the years he was under my care and observation. This work without question had a tendency to further impair the health of Carl R. Francis from the condition which he had at my first consultation with him in 1921. He was in no fit condition to work at all because of his poor physical condition.

### CROSS INTERROGATORIES

propounded to Ferris Arnold:

I have no office records of my examination and treatment of Carl R. Francis. My advice to him at the various consultations with him as to the effect upon his general health and the effect upon his special disability of his following the occupations of cook or waiter was not to work if he could possibly avoid it. He worked at times as he had to have food for his family. The following of the [62] occupation of cook and waiter increased his poor physical condition. That is, made it worse.

Q. If you have answered that in your opinion Carl R. Francis was totally and permanently disabled in 1921 in accordance with the definition as set forth in Interrogatory No. 17, will you state exactly what impairment of mind or body rendered it impossible for Carl R. Francis to follow the oc-

(Deposition of Dr. Ferris Arnold.)

cupation of cook or waiter, and how you can reach the conclusion that such impairment of mind or body would make it impossible when in fact your testimony shows that it was not only possible, but that he did in fact follow the occupation of cook and waiter during the period he was under your observation?

A. The heart, kidney and chest condition was such that he might have died while at work. His love for family and the need to furnish food for them caused him to tax himself to the utmost to work for them, even though he was unable to properly do so.

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### TESTIMONY OF ROBERT J. HANLEY

on behalf of the plaintiff:

My name is Robert J. Hanley and I reside here in Billings. By occupation I am physician and surgeon and I have lived in Billings fifteen years. I graduated from a medical school or college in 1914 and since have been engaged in the practice of my profession in Montana and Wyoming and am licensed to practice in both states.

I am acquainted with Carl R. Francis and have known him since 1926. He had occasion to consult me professionally in 1926 after Dr. Arnold had left Billings. I have had consultations with Mr. Francis from 1926 up to the present time. Occasionally from 1926 up to this time I have made physical



(Testimony of Robert J. Hanley.)

examinations of him. I examined him last fall and also this week. The purpose of these examinations was to ascertain his general physical condition and to see if I could do him any good. I first went into the history of his case, and from the information received as to the history of his case and the [63] physical examinations made of him I was in a position in 1926 to form an opinion as to his physical, mental and nervous condition. When he first came in, I was the Eagles's physician here, and he was a member of the Eagles before he went to War, and he came in suffering from a chest condition. He had severe cold and neuralgia all through his left lung and right lung. The pulse was fast and running a slight temperature at that time. His urine contained casts, some albumin, and low specific gravity, and he had several deep scars on his left chest in the axillary region, at the tip of the left scapula. His pulse was fast—the quality of the pulse was not strong. His heart was—the sounds were weak, and the inspiration was shallow over the lungs, and he was in a generally run-down condition and emaciated. I have testified as to the condition of his heart. I have not noted any changes in his condition particularly, since then. At present he looks better than he ever has at any time I have been taking care of him. He says he has not been working this winter. Rest will help to make his condition better than when working. At that time he claimed to be nervous and

(Testimony of Robert J. Hanley.)

irritable, and he also gave a history of being very nervous if somebody would make a sudden noise behind him or where he couldn't see what was happening. His condition most likely came from the original injury, the chest injury. If you have an object driven through your lung, there is bound to be an after effect, depending entirely upon the amount of the wound, severity, and the infection which occurs at the time of injury. I mean by this chest injury the wound he received in action. I believe that he was permanently and totally disabled in accordance with the Treasury definition at the time of my examination in 1926, said Treasury Department definition of total and permanent disability, being "any impairment of mind or body which renders it impossible for the insured to follow continuously any substantial gainful occupation without seriously impairing his health, and when it is of such a nature as to render it reasonably certain that it will continue through the lifetime of the insured." Most likely the disability was incurred at the time he was injured in action. In my opinion I don't look for any improvement in his condition. I know that Mr. Francis has worked during this period. I advised him not to do any work that would require any physical effort. The reason why he did not take that [64] advice was I suppose he had to support himself and his family. I figure that his work hasn't helped his physical and mental condition any.

(Testimony of Robert J. Hanley.)

Cross-examination  
by Mr. Evans.

I did not testify that I thought he was totally disabled back in 1919. I haven't treated him since from 1926 until now. I imagine that he can follow the lighter parts of the occupation of cook and waiter, notwithstanding his disability, those parts where there would be no lifting or heavy work. He might do some lighter work, like frying, etc. I am not familiar with the amount of work he had at the Ferndale Cafe. He never runs a pulse less than 100. I have never found it so. His heart action is weak, and he has an accentuated second sound; he also has a lessened motility of the left lung, which causes that lung not to function in the same degree as the right lung. There is no grave disability of the right lung. That is almost normal at the present time.

His work in the Ferndale Cafe and in other places while I have been observing him has endangered his health or life this way: Here we have a man with a pulse of 100 to 120 average. He is not capable of exerting himself to the same degree as a man with a pulse of 72 or 60 or 70, which is practically normal—72. You see you have a man working there with a pulse running at 100, and there is an extra strain on that organ. You have an organ there that is supposed to be 72 in the normal and added labor increased that pulse beat

(Testimony of Robert J. Hanley.)

and the heart tires out quicker; it beats so many more beats a minute than it should, and that added up in a day's work causes it to beat about 148 x 200 beats an hour and tires the heart out, and that is what makes him tired and want to lie down. I don't know exactly how many times since I have had him under my care from 1926 to this time that he has been totally disabled in the sense that he has been confined to his home in bed—three or four times he has had to lay off and go to bed and rest. [65] That was usually for two or three days. His physical condition is better than it has been at any time since I first knew him in 1926. He is fatter and I can't find as many rattles in his lungs and his general appearance is better, except the heart is bad—the same findings—and his lung is moving as much as the other. I base my conclusions that the work he has done in the past twelve years has shortened his life and impaired his health because of the extra exertion on the heart. He has a bad heart to start with you see; he had a bad heart in 1926 and still has. It is practically the same now. You take a heart of that particular type and it is likely to quit at any time. Any exertion is likely to affect that heart. It is the strain on the heart. I am not able to advise a patient, just tell him what he is to do and not to do in order to protect his general well-being.

## TESTIMONY OF JOHN L. TREACY

on behalf of the plaintiff:

My name is John L. Treacy and I am a physician and surgeon, located at Helena, Montana. I hold the position of Consulting Surgeon with the Veterans Bureau. I am a graduate of Rush Medical College, Chicago, Illinois.

I have been in the court room and have heard all the evidence. I have made an examination of Carl R. Francis and I made it at 12:00 o'clock or 12:30 today. From that examination I can give a partial diagnosis. The man has evidence of a very severe wound in the left chest, has scars, adherent and tender, in front, in the axilla under the arm, and in the back just below the shoulder blade. These are painful on depression. In addition to that, he has limitation of motion in his left arm—can't move it around as much as he can the other one, due to the fact that it pulls and drags back when he attempts normal motion. His left arm is somewhat atrophied; that is, somewhat smaller than the right. He has an impairment of grip. There is practically a difference of an inch in circumference between that [66] and his right arm. That is, the muscular power of the left arm is not normal by any manner of means. The man appears to be very nervous; that is, his pulse at 12:30, or approximately 12:30, today was 105 and his blood pressure at that time was about 95, which was quite low for a man of his age. It should be, normally, from 125 to 130. He is not a particularly well nourished individual, al-



(Testimony of John L. Treacy.)

though he is not at the present time emaciated; that is, particularly so. Otherwise, his physical condition is just about normal, with the exception of the important fact that an examination of his heart shows, beside the rapidity of the pulse, a very active, quickly-beating heart; also it shows lack of tone in the muscles. That is, it has no snap; doesn't pound as it ought. I did not notice any particular heart murmurs. He is extremely nervous, and I noticed particularly that in the examination of him he shows marked, what we call, dermatographia; that is, if you scratch along the skin with your fingernails, write your name, in a minute or two the skin becomes red, and will distinctly show such traces, which is an excellent manifestation of a disturbance of the central nervous system.

As to his kidneys I have no opportunity to make a laboratory examination of him, but I have listened to the testimony, and from that, in addition to such examinations as I have made, I would say he would carry albumin and casts in his urine on account of the condition that he is in, and testimony has been introduced here to that effect. He has lowered blood pressure and a severe chest injury, and chronic kidney involvement as well. I am drawing from the testimony which has been introduced here, because I did not make a laboratory examination. I think that about covers his condition as I find it. Taking into consideration the evidence I have heard here today, and also taking into consideration what

(Testimony of John L. Treacy.)

I have observed in my examination of Carl R. Francis, in my opinion [67] he is totally and permanently disabled within the definition of the Treasury Department.

Mr. EVANS.—Dr. Treacy has testified in these cases before and is familiar with the definitions, and it is not necessary to repeat it to him.

WITNESS.—I see no other reason for it, in my opinion, that total and permanent disability will date back to the time he was wounded in action. I don't think we have any evidence on record of very much improvement—certainly there will be no improvement of the chest condition, in the scars, nor in the arm, and to the best of my knowledge and belief, it is extremely rare for any improvement in such condition as the heart is in. Under the most favorable circumstances, the chronic nephritis is very likely to be permanent. The picture as it presents itself to me is simply this: This boy was struck in the chest and lung with a piece of shrapnel. There is no question but that something struck him. I am taking his word for the fact that it was shrapnel. This missile perforated his lung; I am positive of that, assuming that he is telling the truth always. I have no occasion to doubt he coughed and spit blood at the time, which he would not have done had it not penetrated the lung. He undoubtedly had a severe internal hemorrhage, which is manifested by the fact that he gradually grew weaker, and later on, he states that he was so

(Testimony of John L. Treacy.)

depleted—so much blood lost in France—that he was fearful for his life. His physicians were fearful of it, to such a point that they saw fit to introduce into his veins practically 700 cubic centimeters of blood. There is no reason to doubt——

Mr. EVANS.—At this point we object to witness continuing any further, in view of the evidence that we——

The COURT.—He is giving his opinion on the evidence he has heard in the case. He heard the entire evidence in the case.

Mr. EVANS.—Yes, I understand so, and I am perfectly willing that he testify as to his opinion, but I object to his repeating the evidence.

WITNESS.—I simply told you why I believe that. [68]

Mr. Evans. I think the answer of the witness is argumentative—a repetition of the evidence and not a recounting of his opinion.

The Court. Counsel can interrogate the witness, and in asking him his opinion on the various phases, without reviewing the entire testimony, there may be something very material he could bring out, not letting him cover the entire testimony. However, finish that sentence.

(Witness continuing). That this boy had at that time a very severe injury and hemorrhage, which we know would produce lasting results in itself. Subsequent to the time of this injury, the boy had for a period of months pus discharge from his lung,

(Testimony of John L. Treacy.)

from his chest, and undoubtedly had a lung abscess, and which is ample to cause a heart condition by absorption of the toxine, and it is also capable of causing the kidney condition. I have no reason to believe it is not due to his injury, and his condition is chronic—it is going to last—and if I were called upon in a private capacity to advise this man on any one of the three conditions which exist, it would be sufficient for me to advise him, if possible, to get complete rest. Chronic heart and kidney conditions require complete rest, and if he doesn't get rest, he is lost. The conditions which existed at the time of the wound were of such a nature that they would very much produce the conditions which he has now.

I don't think he has worked continuously. I have taken into consideration the fact that his work is not continuous, that he isn't able to work at times.

Q. Was there any impairment to his health—do you think this would be the natural tendency, to impair his health?

A. Certainly.

Mr. EVANS.—He has already testified to that.

The COURT.—He has gone far enough; he covered it [69] very thoroughly.

(Witness continuing). His work in the past twelve years impaired his health or has been a serious menace to his health in this way: In the first place, to make it very brief, I agree with Dr. Hanley—I believe that a heart that is going once

(Testimony of John L. Treacy.)

and a half as fast as it should is working too hard, and he ought to be able to rest; in the second place, I don't believe that a man with a chronic kidney condition should be exposed to heat, steam, vapor, cold, heat and things around the kitchen. He would be better off if he were to rest.

### Cross-examination

by Mr. Evans.

Q. Now, doctor, you have heard all of the evidence, and I ask you to state definitely, if you can, what impairment of mind or body he suffers at the present time which is the result or directly attributable to his having worked during the past ten years.

A. I think the best way I can answer that is by referring to my examination and history of the case. I find that during the past six months or so, he has not been working, but has been loafing around the Country Club, and has not been actually engaged in work, and that as the result, he is better. I maintain, therefore, that if he had not worked during the past ten years, he would be in much better condition than now. He has harmed himself and has probably worked on his nerve. I don't think his heart and kidneys, and especially his nervous system, would have been in their present condition had he been able in 1919, when he got out of the Army—had he been a man of wealth and



(Testimony of John L. Treacy.)

could have retired and rested. I couldn't say how much it increased the bad condition.

Q. Assuming that he was totally disabled in the first place, how could he get any more disabled by having worked in the past twelve years?

A. I talked of the total disability as regards the [70] Treasury definition. Of course if he had been totally disabled, he would have been unable to work at all, would not have been able to get out. As he tells on the witness stand here, he has not been able to continuously carry on a gainful occupation.

Q. The evidence is that he has, doctor, but you are endeavoring to explain it that way because of this definition of "continuous." What is your understanding of "continuously following a gainful occupation"?

A. My understanding of it—exclusive of any legal definition—is that a man, in order to do so should be able to go out in competition with the world and work day after day and week after week and year after year, in his given vocation, until his life ends.

Q. How long must that continue?

A. Well, the normal span of life—threescore years and ten.

Q. Then do you believe that if a man loses one week in a year he is not continuously following a gainful occupation?

A. No, I didn't say that.

(Testimony of John L. Treacy.)

Q. Well, do you believe that if he loses a month in a year, that he is not continuously following a gainful occupation?

A. If he lost a month every year on account of sickness, I think he would be pretty close to that point.

Q. But do you believe that a man who follows it for two years and eight months, in accordance with the testimony, and draws pay for that time, is not following continuously a substantially gainful occupation?

A. I believe he was during that period.

Q. You believe that during that period he was continuously following a gainful occupation?

A. Yes.

The COURT.—Suppose he is able to work for two years and eight months and the evidence should [71] show that, while he has been employed, we will say continually, he has not been able to work continuously. Suppose occasionally and at frequent periods he has been ill from the cause you describe, and as stated, has not been up for three or four days at a time, and frequently during that entire period, other good-natured and friendly men and women have done his work for him; that he has had frequent fainting spells, as testified, then what would you say as to this?

A. That is a different question from Mr. Evans'. I would say that he was not capable of following

(Testimony of John L. Treacy.)

a gainful occupation as described by the law, under the circumstances you give here.

The COURT.—Well, we will have to put the evidence in there. We are putting a hypothetical question that the jury may have the benefit of expert testimony, and the jury may have to determine that. Proceed.

Mr. EVANS.—That is all.

Mr. SMITH.—The plaintiff rests at this time.

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Mr. EVANS.—If it please the Court, I have a motion I want to argue as follows:

The defendant herein moves for a directed verdict, reserving for itself the right to have this cause submitted to the jury, but at this time moves the Court for a directed verdict, for the reason and on the ground that there is no substantial evidence in the record that the plaintiff became totally and permanently disabled on the date mentioned in the petition, or at any other time, and for the further reason that, assuming that all the evidence is true as given herein, such evidence is not the sufficient basis to support a finding of permanent [72] and total disability.

The COURT.—The motion will be denied.

## TESTIMONY OF WILLIAM H. FORTIN

on behalf of the defendant:

My name is William H. Fortin and I am located at Fort Harrison, Montana. I am a physician and I have been a practicing physician since 1908. My present employment is Outpatient Medical Officer. I don't make physical examinations of veterans of the World War at this time; I did previously,—not since I have had charge of the desk.

I know the plaintiff, Carl Francis, and I have made an examination of him at the Veterans Bureau's office at Helena, Montana, March 3, 1926. I did not make an examination of him before that to my knowledge. As to his physical condition and all of his disabilities—at that time I made a special examination of his chest, particularly with reference to his lungs, and I found or diagnosed the condition which I described as chronic fibrous pleurisy and fibrosis of the left upper lobe. In considering his disability from following the ordinary occupations of life I think we would have to consider the entire condition—the traumatism or injury as well as the result. The fibrosis in the lung would have a tendency to perhaps make him a little short of breath. The thickened pleura would tend to restrict the motion over that portion of the lung, further increasing the shortness of breath. Then, too, the contraction of the scar over the wound would perhaps increase the restriction over that portion of the lung so that the breath would not be as easy, especially under exertion, as if he did

(Testimony of William H. Fortin.)

not have that condition. There was no heart condition found in 1926. The heart beat was regular, no murmurs; blood pressure 112-78. That blood pressure in my opinion indicates that his condition is normal. In 1926, when I examined him I found his heart normal as any other man's heart. With reference to the testimony to the effect that [73] in 1926 and at other times, he was suffering from a condition of the kidneys called nephritis, there is no urinalysis of record; therefore, I do not know whether a urinalysis was made or not. However, there was no complaint on the part of the plaintiff at that time in reference thereto. In making these examinations it is usual to ask for all of the complaints of the patient or man being examined. When a veteran applies or presents himself for examination, the first thing we do is to ask him concerning his complaint. I have the complaint here in writing as to what was stated to the doctors.

Q. Will you please read the same.

Mr. Smith. Was this entire statement made to you and signed by Mr. Francis?

Witness. Yes.

Mr. Smith. No objection, Your Honor.

(Witness continuing). I asked him if his lungs gave him any trouble and his reply was: "Just in my chest; when I get cold the left one draws; the two outer fingers get numb." In 1926 he made no complaint of either kidney or heart trouble. No, I don't have all of the examinations that were made,



(Testimony of William H. Fortin.)

consisting of all examinations made by doctors from the time he left the Army until 1926, but at that time I had the entire file before me.

The regular routine followed by me as to bringing forward any diagnoses of diseases previously suffered at the time of my examination and examining particularly for the disease which the history shows he may have suffered from, is, first, to get the man's complaint. After that, I will take his case file and refer to the Adjutant's record, covering his medical record in the service. After examining the medical record in the A. G. O., the record from the Adjutant General's office covering his service in the Army, I then begin at the front of the file, unless it is a short one, with which I am very thoroughly familiar—in which case I don't have to do that—[74] and I go through the file and find the diagnoses made by other examiners in the past. After getting all the data in the file and the A. G. O., I proceed then to examine the man myself and give attention to the information I have gathered. As to the nature of the kidney condition and the heart condition as to whether they were temporary ailments or a permanent chronic condition, all I can say is they were not permanent at the time I examined him, and if some other doctor found they were subsequently, I couldn't dispute that. It is possible that he would have a temporary condition such as they testified to which did not continue to the time I examined him. There

(Testimony of William H. Fortin.)

was some testimony yesterday by Dr. Treacy that he had a pulse of 106 at 12:30 o'clock yesterday and I can account for that rapid pulse by other means than as a permanent disability of the heart. The pulse may vary from one hour to the next all during the day, depending upon what the man is doing. Very likely a man who has been on the witness stand for two hours just prior to having his pulse taken might readily have a pulse of 106 within 15 minutes to half an hour after having been on the witness stand. The cause of such a pulse is probably the man isn't accustomed to testifying and is under a nervous strain and is somewhat uneasy—all of that would tend to increase the pulse rate.

I heard all of the testimony yesterday.

I have had x-rays made of this veteran and there is nothing in any of the x-rays or other examinations to indicate that the missile entered the lung. When a missile penetrates through the lung tissue itself, that is discernible in the x-ray film of the lung in that the portion of the lung tissue that was destroyed will be replaced by fibrous tissue, which is familiarly known as scar tissue—a dense fibrous tissue, and that tissue being denser than the lung tissue itself, will show a streak across that portion of the lung.

Q. Did you see any such streak in the x-ray picture?

The Court. Where is this x-ray? [75]

Witness. Dr. Bridenbaugh will have it.

(Testimony of William H. Fortin.)

The Court. You should have it here right now, to be fair about this; it is not sufficient to say that some other doctor will produce the x-ray and you testify about it—give testimony about something that is not present.

Mr. Evans. I will recall this witness later.

(Witness continuing). In my examination of this man about the only disability or condition he had which would handicap him from following his occupation as cook or waiter would be the injury, or the scar tissue which formed at the side of the injury, and whatever injury was done to the nerves in that region. So far as the lung itself is concerned, it would not handicap him in any way. I do not believe that the disabilities from which he suffered in 1926 when I examined him prevented him from following the occupation of cook or waiter, and that is verified by his statement that his present occupation was that of cook, which he was following at the time.

### Cross-examination

by Mr. Smith.

The examination report from which I testified is my own report and I haven't referred to anything except his statement to me and my examination findings. I made no other examination of him. Dr. Smith, Dr. Berg, also examined him and I was not present; and they were not present when I examined him. The statements I refer to were

(Testimony of William H. Fortin.)

those made to me and not those made to Doctors Berg and Smith. I can't say what statement, if any, he may have made to the other doctors with reference to the other ailments. I did find in my portion of the examination that he had a lung condition there due to this scar. I also examined the heart at the same time as the lung, that fell to my duties then. That is true that a person may be troubled with kidney trouble and know nothing about it, and it frequently happens and it is true that usually the first information a person has is after the doctor has made an [76] examination. It would not be unusual if Mr. Francis did not make any complaint of kidney trouble. It is not correct that the only examination doctors give him is directed to the complaints he makes. In answer to Mr. Evans' question my reply was that the first thing we do is to take the claimant's statement of his complaint; after that I refer to the case files, and the first thing I look for in that file is the A. G. O. record, to see what medical record he carries from the time he was in the service. After that has been reviewed, I follow the examinations through the file up to the present time, to see the diagnoses that had been made in this case at previous examinations. Then I make my examination to pay particular attention to his complaint, the A. G. O. record, which is the record of medical treatments rendered during military service, or

(Testimony of William H. Fortin.)

previous examinations which show a condition existing.

I have examined Mr. Francis just once to my knowledge. I have no record of any other examination.

I have been in Helena a little over nine years.

If I find anything wrong other than the complaints that are made, I do not tell the patient what I find wrong unless he asks for it, or if it is some particular thing he should be advised on, more particularly a heart condition, tuberculosis, or something of that sort, where I would have occasion to warn him to avoid certain exertions or conditions. I always feel that if there is anything about a veteran's condition he should know, it is more important for him to know it than to have it in the case file. It is possible that conditions develop about which the veteran has never known on these examinations.

The average normal pulse rate is usually recognized to be about 78 in an adult person normally, but there are a great many people who have a pulse slower than that and are normal, and a great many are way above and are normal. The normal range is 70 to 80 we will say. I wouldn't say that when it gets up to 80 it is really getting beyond normal, [77] unless I had a patient under observation and found that 80 or 85, whatever it might be, was not normal for that individual. Taking the pulse for the first time, you couldn't arrive at any



(Testimony of William H. Fortin.)

positive conclusion—you wouldn't know whether that was his ordinary pulse rate or whether it was a temporary condition as set up by some temporary environment, or whether it was the result of some chronic disease that might be present. In order that we have a true picture of Mr. Francis' pulse rate, it will be necessary for me to take that rate on different days and under different environments, and not only that, but it would also be necessary to examine and see if there was anything wrong to produce it. Before I would want to say anything definite as to his pulse rate, I would want an opportunity to examine under different conditions—want to examine him and know the conditions under which the pulse rate existed, at different times, unless I found him suffering from some disease which would account for that condition. I examined Mr. Francis' pulse rate just the once. The pulse rate is not recorded at that time. Heart rate regular, no murmurs. Blood pressure 112-78. That is all, it doesn't show a pulse rate. If there had been anything abnormal about it, it would have been recorded. I say the blood pressure was 112-78 and that is not abnormally low blood pressure. As to the normal pressure, I have not his age here; don't know how old he was at that time. I would say, oh, 120, or even more, 112, 115 to 130-35. 120-80 would be recognized about normal, and a variation of 10 millimeters either way is within the normal limits. 120-80 is the doctors' standard for a person about

(Testimony of William H. Fortin.)

20-21 years of age. Your blood pressure goes up as you grow older. If it is 120-80 at about 20-21, the normal at about 32 may be the same, or it may be up to 125 or 130. The second figure at 32 may be the same; that doesn't go up as rapidly as the systolic pressure. It may be that the normal figure that we work from for a man of 35 is about 125-80; it isn't always. [78] It may be 120-82. In answer to Mr. Evans' question I stated I thought it very likely that the fact that the man has been on the witness stand for more than two hours previously had some significance with reference to the pulse rate of 106 that Dr. Treacy found. This testimony had no reference to the statements of Dr. Arnold and Dr. Hanley. It is very possible that in six years time there could be quite a difference in this man's pulse rate. My testimony is in reference to the examination made March 23, 1926, and I do not attempt to refer to the man's condition before or after that.

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#### TESTIMONY OF JAMES I. WERNHAM

for the defendant:

My name is James I. Wernham and I am a practicing physician here in town. I know Carl R. Francis. I examined him, I think—I don't remember the date—several months ago—perhaps five or six months ago.

(Testimony of James I. Wernham.)

Yes, that is my handwriting on that statement. As it has been recorded here, his complaint was pain in the arm and forearm, extending down the arm to the fingers, and complaint of numbness in the arm and chest, and that the arm and shoulder were not as strong as they formerly were, and pains in the chest, in the region of the heart, and he complained also of irregularity of the heart and the heart pounding. He also said that he was unable to do the amount of work that was required of him in his occupation of cook. In fact, he was unable to do any heavy lifting, as, for instance, lifting the flour and packages necessary in that work, and on examining him, I found that he had a scar, which was, as he said, from a gunshot wound in the upper left shoulder; that is, immediately above the base of the heart, and also an operative scar, where he had been operated upon, posteriorly, where he said a foreign body had been removed. The left arm seems to be smaller than the normal right, seems atrophied. He was unable [79] to say whether it was due to lack of use, being his left arm, or from a nerve injury—some atrophy, somewhat like paralysis, so measuring the arm, it was found to be one inch less in circumference than the normal right arm, and he was unable to raise the arm to the level of the head or back parallel of the line of the body. As to his general appearance at that time, he had a sallow complexion. He was erect in stature; his gait was normal, and his temperature was

(Testimony of James I. Wernham.)

normal. His pulse was 88 sitting, 112 standing. The valvular tones of the heart were normal. The blood pressure was 120 systolic and 78 diastolic. The outer edge of the heart seems extended further to the left than normal, which would be either due to enlargement of the heart itself or due to scar tissue drawing the heart over. The urine examination was negative. At that examination I think there was some weakness of the heart. The fact that the pulse was 88 lying down and 112 on getting up showed there must have been some weakness of the muscle. This is faster pulse rate than normal. In my opinion there was nothing about that heart condition that would prevent him from doing his work as a cook or waiter, not in doing the immediate work itself. I would say that the lack of strength and other disabilities in that arm would probably handicap him some in doing the duties, or a part of the duties, of a cook and waiter. He has some disability—things that he would do with more difficulty than he would otherwise experience. As to lifting heavy objects and such as he has testified to, I think the strength in that arm is somewhat impaired. He has not muscle power—the arm is smaller. There is no weakness in the other arm. I think he has full function of that right arm. I made an examination of his urine and the urine was normal. It is my opinion that in January, 1931, when I examined him, he had no kidney disease at that time. [80]

(Testimony of James I. Wernham.)

Cross-examination  
by Mr. Smith.

The date I made this examination is there; I don't remember it. The date is January 27, 1931, longer than I said, made about sixteen months ago.

Mr. EVANS.—Did you ever examine him before that, doctor, as you recall?

WITNESS.—I don't recall that I ever did. He might have been in the office with some of his family, but I don't remember that I ever examined him.

Witness (continuing). In making this examination I can't say that I was doing this for the Veterans Bureau. I am the Government doctor here in town, I represent the Veterans Bureau. No doctor assisted me in this examination. I think this was a personal examination. You see I do practice, besides the Veterans Bureau work, and I think Mr. Francis came to me as an individual, rather than as a patient of the Veterans Bureau at that time. In my examination of the heart I found that it was not normal and I also found what you might call a myocardiac insufficiency. It should be treated by not over-exertion. I think the only treatment we doctors can prescribe for such condition is rest. From my examination I recognized that he did have a disability. There was nothing in my examination that made me doubt his statements that he was not able to do all of his



(Testimony of James I. Wernham.)

work as a cook and waiter. I said his urine showed normal. There may be times when albumin will not show in the urine and at other times will. All I can say is that his kidneys were normal at that time. I couldn't say that at other times they might be different—might be.

The COURT.—Anything further?

Mr. SMITH.—No, that is all, Your Honor. [81]

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#### TESTIMONY OF J. H. BRIDENBAUGH

on behalf of the defendant:

My name is J. H. Bridenbaugh and I am a physician, practicing here in Billings.

Mr. SMITH.—We will admit his qualifications.

(Witness continuing). My specialty is x-ray. I have taken x-ray pictures of Carl R. Francis and I have them with me. The pictures were dated July 2, 1923. I examined him, his chest, two or three days ago, at the request of another physician, and the films were delivered to the physician. The attorneys for the plaintiff have an x-ray picture in their possession that I made. An examination was made at the request of another physician and was sent—x-ray and report—to another physician, Dr. R. J. Hanley. I was not in court yesterday, but he was the same Dr. Hanley who testified here yesterday.

(Testimony of J. H. Bridenbaugh.)

The x-ray examination that I made for the Government was made of the chest to show the condition of the heart and lungs. I find no evidence of disease of either heart or lungs or the bones of the chest. Referring to the testimony to the effect that Carl R. Francis in 1918 suffered a wound from a piece of shrapnel about the size of the thumb, and that that, in all probability, entered above the heart and penetrated through the chest and was taken out under the shoulder blade at the back, such a wound would not necessarily leave evidence in the lung tissue that would show up in an x-ray. If such a wound had occurred, going through the chest, in the lung, and had penetrated through the lung, if there was a real disability of the lung itself from that injury, such disability might be evidenced in the x-ray. Referring to the x-ray picture I can't find any evidences of scar tissue in that lung that might come from a penetrating gunshot wound. I have never made any other than an x-ray examination of this patient.

Mr. EVANS.—You may cross-examine.

Mr. SMITH.—No cross-examination. That is all. [82]

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Mr. EVANS.—Before the doctor leaves, I would like to have the plaintiff produce the x-ray taken by Dr. Bridenbaugh a day or two ago. If you are

going to produce it, we would like to have it before the doctor leaves is all.

Mr. SMITH.—We have no objection to the same being brought in, doctor—no objections on our part.

Mr. EVANS.—I think it would be informative at least if you will do so, doctor, and we will return it at your convenience.

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TESTIMONY OF  
DR. WILLIAM R. MORRISON

on behalf of the defendant:

My name is William R. Morrison and I am a practicing physician here in Billings.

Mr. SMITH.—We will admit the doctor's qualifications.

(Witness continuing). I know Carl Francis and I have examined him. My examination was a special one. My specialty is eye, ear, nose and throat. I first examined him some years ago. It was in the early stages of the Veterans Bureau activity.

Referring to the two reports which you handed me, one dated in July, 1922 and the other in December, 1922, there was no disability at that time, from that angle. As far as his eyes, ears, nose and throat were concerned he suffered no disability whatsoever in 1922. I know nothing as to the other parts of his anatomy, as to his disability. I made no examination as to that.

Mr. EVANS.—That is all—you may cross-examine.

Mr. SMITH.—No cross-examination.

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### TESTIMONY OF MARCUS H. WATTERS

on behalf of the defendant:

My name is Marcus H. Watters. I am a physician.

Mr. SMITH.—We will admit the doctor's qualifications.

(Witness continuing). My appointment is physician, Veterans Administration Hospital, Fort Harrison, Montana and I have been there seven years the 3rd day of last March. [83]

I have examined Carl R. Francis on June 28, 1927, as I remember the date. Those memoranda which you hand me are the clinical and the other is the case personal file of the patient, while he was in the hospital at Fort Harrison.

The examinations at Fort Harrison are made, first, beginning with what is known as the receiving or reception ward—

The COURT.—Ask him a few questions to shorten it up.

(Witness continuing). I am a member of a board of three who finally review all of the examination reports, and in case of question I personally examine the man, and I did personally examine Carl R. Francis in connection with these

(Testimony of Marcus H. Watters.)

other doctors, on the date stated. At the time of my examination in 1927 I found Carl R. Francis suffering from sinusitis; that is inflammation of one of the air chambers; I think it was either the right or the left—it doesn't make any material difference. He also had atrophy of the shoulder muscles; that is a shrinkage. In other words, the left arm was smaller than the right, which was due, in all probability, to the high explosive injury he received during service. There was also a diagnosis made by a specialist in nervous and mental diseases, due to his having neuritis (which means inflammation) of the left ulnar and median nerves. He also had shown, in both physical examination and x-ray, a fibrosis, which means scar tissue, from the healing of some wound in the upper lung, which is in the upper lobes, and diagnosis of a pleurisy, which is a thickening of the pleural sack covering the lungs, in the left upper lobe. He also had some ordinary conditions which do not amount to anything in particular, except—well, they really don't amount to anything—some dental trouble—his teeth, that is all. I should judge that I had him under observation at that time, probably—that is pretty hard to answer—probably about thirty minutes or so, personal observation. He was in the hospital from May 27, 1927, to July 10, 1927. He came to the hospital at that time for—the complaint being swelling in [84] his face, which he thought, or was told, might be due to the condition which I previ-



(Testimony of Marcus H. Watters.)

ously mentioned, sinusitis, or inflammation of one of the pockets in the cheek bone. The other complaint was of rheumatism in the right hip and knee, which he said prevented him from working from time to time. I have x-ray facilities and laboratory facilities for the study of any and all diseases at my command there at the hospital. The x-ray of the lungs, that is, the chest x-ray did not show any disability or any disease of the heart in 1927. A physical examination did not reveal any disease of the heart at that time, that is 1927.

I have the temperature and pulse charts with me. The pulse rate on admission was 90. The second day after admission, it was recorded as 100. In the afternoon of the same day it was recorded as 80, and with the exception of a few slight declines in the pulse rate, for the next week it did not reach higher than 90, and the average pulse rate was 85. His blood pressure at that time was 120-84 I think, if I recollect correctly. Yes, 120-84. It would be considered practically a normal blood pressure for a man of his age I would say. This examination was made in 1927 and at that time there was no indication of disease of the heart that would prevent his following that vocation, that is in 1927. The neuritis or inflammation of the left ulnar and median nerves, as previously described would prevent him from following the occupation of a cook or waiter; also the atrophy of the

(Testimony of Marcus H. Watters.)

shoulder muscles and the consequent atrophy of the muscles of the left arm.

Q. Now, did you understand my question, Doctor? I did not state the question "handicap" him from following that, but "prevent" him from following.

(Witness continuing): I did not understand your question, and it is my opinion that this disability would not prevent him from following that occupation, but I agree, however, that it would handicap him. How seriously, it seems to me, would have [85] to be answered by qualifying same—depending upon whether the man follows the occupation of cook or baker in a position of first cook, second cook, or what not. Assuming that he is qualified as a cook, and that he has help in lifting the heavier objects and is favored to some extent by fellow employees and others, I believe that with that assistance, in 1927 he could have followed the occupation of cook or waiter. At the present date, I can't state.

Cross-examination  
by Mr. Smith.

I believe with the assistance of other persons in performing parts of his duties he could follow the occupation of cook. As to the effect the continuous and steady hard work would have upon him at that time in his work as a cook since 1927, it is quite possible and quite probable that, under strain—ex-

(Testimony of Marcus H. Watters.)

treme exertion—his heart conditions we have talked about so much might have developed, and it is a very probable condition. Nobody can tell what might be the effect. The fact that there were pus formations at the time of his wound that continued for several months, it is possible that those pus formations were capable of producing a heart condition that might not be apparent for years and show up later in life. A pus formation of that kind does bring about a heart condition that eventually develops into heart trouble.

#### Redirect Examination

by Mr. Evans.

Yes, sir, an examination was made of the urine. The urine was negative as to the presence or absence of nephritis or kidney disease. At the time in 1927, my conclusion was that he showed no evidence of kidney disease. [86]

#### Recross Examination

by Mr. Smith.

There were two urinalyses taken at that time. The fact that albumin did not appear at that time was not positive proof that there was not that condition, and especially after rest the albumin is apt to clear up and leave the urine. .

(Testimony of Marcus H. Watters.)

Redirect Examination  
by Mr. Evans.

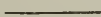
If this man had suffered from the condition of nephritis, possibly for a period of seven or eight years prior to this time, it might and it might not show in his urine. The probabilities are, if he had true nephritis or Bright's disease at that time, it would have shown then. I do not believe that nephritis has existed ever since his discharge from the army and shown by the Army Records. I do not recall the evidence as stated in the Army Records of 1919 in relation to nephritis and of course it is possible that it existed, but I don't recall the date of the final healing of the wound or abscess, so I could not make a statement as to that.

Q. But in any event, you are quite sure that there was no particular disability from the kidney condition in 1927?

Mr. SMITH.—Object to that. It is repetition.

The COURT.—Yes, he can't testify unless there is some foundation upon which to base it.

Mr. SMITH.—That is all.



TESTIMONY OF J. H. BRIDENBAUGH,

recalled on behalf of the defendant:

Q. Doctor, I hand you the three x-rays which you had in your possession a moment ago, and will

(Testimony of J. H. Bridenbaugh.)

you select from them the one that you stated was taken day before yesterday?

(Witness selects such x-ray.)

Mr. EVANS.—We will offer this as Exhibit G. We offer Exhibit G in evidence. [87]

Mr. SMITH.—No objection.

WITNESS.—I had experience as a surgeon during the World War. I did x-ray work at that time. The difference between shrapnel and machine gun bullets, or rifle bullets, as to their effect on the human body, and especially on the chest is that a shrapnel wound ordinarily causes a more serious wound because it is an irregular object and traumatises the tissue. Assuming that it was a piece of shrapnel the size of the end of my thumb, as testified to, that struck him above the heart in the left chest, and was extracted from the back under the shoulder blade, as to the probability or possibility of that having been a penetrating wound or otherwise, the only statement I could make would be from the x-ray study. The x-ray shows no trace of a penetrating wound having been received. Assuming that it did penetrate the lung, there is no evidence in the x-ray study of a disability of the lung suffered at the present time.

Cross-examination

by Mr. Smith.

An x-ray would not necessarily show a myocardiac insufficiency and it would not always show such insufficiency.



TESTIMONY OF LOUIS W. ALLARD

on behalf of the defendant:

My name is Louis W. Allard and am a practicing physician here in Billings.

Mr. SMITH.—We admit the doctor's qualifications.

WITNESS (continuing).—I would not remember Carl Francis except from my notes or report. I have copies of the examination or the notes that I made in my possession. I examined him on January 15, 1924. Shall I read my report as it is?

The COURT.—Any objection?

Mr. EVANS.—Only the material parts, doctor.

Mr. SMITH.—Are these your notes that you made at the time of the examination?

WITNESS.—Yes, this is the report I made to the [88] Board at the time of my examination.

Mr. SMITH.—That is from your notes?

WITNESS.—Yes.

Mr. SMITH.—You haven't your notes with you?

WITNESS.—No, I haven't.

Mr. SMITH.—Did you make the examination yourself or is your report based on an examination by some other doctor?

WITNESS.—I made the examination myself.

Mr. SMITH.—I don't think there is any objection.

The COURT.—No, proceed, Doctor.

WITNESS (continuing).—This report is made in connection with the Board and I have no record of the complaints made at that time. It is cus-

(Testimony of Louis W. Allard.)

tomary for a man to make a complaint to the Board at the time he is examined only as we question him as to his physical disability, which we do of course to determine what examination we should make. By referring to these notes here I could state definitely what complaint was made at that time. He complained of soreness in the left chest and arm when doing anything involving an extra use of the left side. There are no other complaints recorded here. Referring to my notes, the subject is a well-muscled, symmetrically developed individual, with straight limbs, normal spine, square, symmetrical shoulders and normal joints and feet. The muscles are normal in tone and range of action, except slight atrophy of the muscles of the left arm and forearm, and slight limitation in abduction of the left arm at the shoulder. Four well-healed scars, the result of a wound received in action, are noted on the left thorax, as follows:

1st, an irregular, key-shaped, scar, 4 inches in length, with a 4-inch cross scar, averaging about  $1\frac{1}{4}$  inch in width, situated at a point bisecting a line drawn from the nipple to the middle of the left clavicle. This scar is adherent to the pectoral muscle and covers a bony irregularity [89] in the 2nd, 3rd and 4th ribs.

2nd, a scar  $\frac{1}{2}$  inch wide, extending downward and forward for  $3\frac{1}{2}$  inches from the lower angle of the scapula. This scar is adherent to the subcuticular tissue.

(Testimony of Louis W. Allard.)

3rd, a triangular scar with the apex at the posterior axillary fold, extending backward 2 inches to a 1-inch base.

4th, an irregular scar, 3 inches in length, averaging  $1\frac{1}{4}$  inches in width, situated in the axilla, and adherent to the subcuticular tissue.

All scars are well healed. The contracted biceps of the left arm measure 1 inch less than the right arm. The forearm has most prominent circumference; also measures 1 inch less on the left side. There is diminished sensation in the region of the small, internal, cutaneous nerve of the left arm. There is a large varicocele and a very pendulous bag. Diagnosis: Well-healed gunshot wound left thorax, left varicocele. Slight atrophy in the left arm and forearm. The only diagnosis made on the report by the Board was gunshot wound, left chest, healed. The date of my personal report was January 15, 1924. I don't know what Carl Francis was doing at that time.

Had the shrapnel penetrated the chest wall, I think I would have had something about that in my notes, and I haven't anything of that kind in my notes. I do have some remarks in my notes that there was a roughening under one of those scars, probably on top. That would indicate that the periosteum on the surface of the ribs was probably torn at the time of the injury. In that gunshot wound scar and other scars, in my professional opinion I think I do not find anything to

(Testimony of Louis W. Allard.)

indicate or rather which would prevent Carl in 1924 from following the occupation of a cook or waiter.

Cross-examination  
by Mr. Smith.

If this piece of shrapnel was removed from the chest at the posterior wall, and it appeared from the evidence at the time the man was injured there was very little outside [90] bleeding, but that the man spit blood, that would not necessarily indicate to me that the shrapnel penetrated the chest. A fracture or a deep contusion would cause bleeding from the lungs. It wouldn't have to penetrate necessarily.

Q. How would the shrapnel get around to the back?

A. There was evidence of scars on the axillary area, under the arm, evidence of scars in front, and evidence of scars I believe in the back, and a suggestion to me that probably he received this injury from the side.

Q. You mean coming in from the arm?

A. Yes.

Q. If the evidence would show that the scar underneath his arm—axillary—whatever you call it—was made for the purpose of probing, then of course that scar would not be made by the shrapnel, would it?

A. Not if shown that it was made in some other manner.

(Testimony of Louis W. Allard.)

Q. With that condition in mind, how do you figure that this piece of shrapnel got around from the front (it being shown from the evidence that he was struck in the front) to the back—to one of the scars on the back?

A. Does the evidence show more than one piece of shrapnel?

Q. Just one piece appears in the evidence.

A. Usually a missile of that kind takes the straightest line through. In that case, it would have to go through the chest wall, but it is possible it can follow the tissue plane. If it should appear that later this man developed empyema in this gunshot wound, and this condition continued for a period of about six or seven months, until the scars healed over, it would suggest a penetrating wound, but not necessarily indicate, but suggest it, and the fact that he spit blood immediately after the injury would also suggest it. [91]

### Redirect Examination

by Mr. Evans.

(Doctor examines x-ray). There is no evidence indicated here in Exhibit G., which is an x-ray taken day before yesterday, of a penetrating wound of the lung tissue, none that I can think of. The left lung is clearer in that picture, in my opinion than the right. Assuming that this is an x-ray picture of Carl Francis' lungs, the evidence indicates that the left lung is better than the right lung as to condition.



## TESTIMONY OF A. M. LOOMIS

on behalf of the defendant:

My name is A. M. Loomis and my business occupation is running a lunch room. My cafe is the Ferndale Cafe and it is located at 25th St. and Montana Avenue, Billings.

I know Carl Francis, the plaintiff in this suit, and I employed Mr. Francis. The first time as I remember, it was the last day of 1923. I think he continued to work for me something like two years or two and a half, the best I can remember. He did my best job in the kitchen, chef cook and pastry cook and I paid him \$32.50 a week. I don't think I ever had any complaint or fault to find with his work as cook while he was in the Ferndale Cafe—no more than I had with any other cook—as little as I ever had with any cook. He performed his service satisfactorily for me. He left my employ because he wanted to take a vacation for a couple of weeks, to go into the mountains, and I sent for my brother, and then I got him to stay with me that winter, as long as he would stay. That must have been in 1927, as I remember,—in the summer of 1927, and my brother Elmer stayed through, as I remember, the rest of the year. He was off two weeks and then my brother worked six or seven months, and then Francis returned and worked for me. I got him back. I asked him to come and work for me. He continued to work for me at that time up until in 1931, most of 1931, most of the time. He [92] had some little time off, I guess.

(Testimony of A. M. Loomis.)

The circumstances of his leaving me in 1931 were: I came into the kitchen and he said: "I guess I will leave," and I said, "Oh, all right; it's all right with me." I didn't discharge him. Some years he took a little more time off from the job than others during the years he was employed by me, possibly sometimes a week or so, and three or four days once in a while, when he wanted to go somewhere—be off for some reason. I think he got sick on the job. I don't think it was so very often, but then I don't just remember. I don't think he was ever out for a period of a week or two weeks at a time on account of sickness—maybe as much as a week, once in a while. I don't recall it if it was over a week. That is kind of hard to say for sure how much time he lost in any one year by reason of being off. I don't think over a couple of weeks, for all purposes, in about four years.

Cross-examination  
by Mr. Smith.

I think Mr. Francis came to work for me the last day of the year 1923, and he worked for me from that time for two or two and one-half years. Mr. Francis wanted to go up in the mountains and my brother Elmer and I did the work, and I really think he did work two or three days while my brother Elmer was here. When he came back to go to work after he had been in the mountains, there was no work for him there while my brother

(Testimony of A. M. Loomis.)

stayed. When my brother left, I think he worked about seven or eight months, something like that, the following summer. I think it was pretty early in the spring—anyhow after Christmas. Then he worked for me up to the spring of 1931, at which time he just quit. I think he did not give me any reason for quitting. He said he believed he would quit. I said, "All right." While he was on the job, the kitchen work was performed satisfactorily. My duties were mostly in the front of the building.

[93]

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### TESTIMONY OF MRS. A. M. LOOMIS

for the defendant:

My name is Mrs. A. M. Loomis and I am the wife of Mr. Loomis who just testified. I work in the Ferndale Cafe. I know Carl Francis. I was there in the Ferndale Cafe when Mr. Francis was employed there in 1924, and on up until 1931.

My observation as to the employment of Mr. Francis as a cook, as to his ability to handle the job and his being satisfactory, well, most always it was satisfactory. I did not hear Mr. Loomis complaining of his work or of his ability to do the duties required of him as a cook very often. I don't know that I ever did have to help him in his work in any way. Sometimes I have gotten the orders if he were busy—something that way. When the shift was busy, they quite often stepped in and

(Testimony of Mrs. A. M. Loomis.)

helped him, if there was something on the stove that needed to be taken care of. I don't know but what he always did his work. He complained sometimes of having a headache and being tired as a rule. I never saw him faint on the job, and I was there practically every day.

Cross-examination  
by Mr. Smith.

I know that in lifting stock pots from the stove, they used to help him. We have always kept two dishwashers and they have always assisted in doing the heavy work. We don't expect our cook to do that work. I never knew definitely that he ever had a spell at the range that way. He complained of not feeling well and all, but I didn't know he fainted. I am, practically all the time we are open, between dining room and kitchen. He always spoke of being tired and not feeling well. Mr. Francis was a dependable man and I could depend upon his being there, and as long as he was on the job and the work was gotten out, that was all I was concerned about. If it hadn't been for the fact that the work was gotten out at all times, I would not have been able to keep him there. If the other employees in the kitchen helped [94] him to do portions of his work, there was no objection on my part to his doing that. The thing the both of us were concerned about was to have the work go along. I know he forgot orders sometimes.

## TESTIMONY OF CHARLES E. RICHSTEIN

on behalf of the defendant:

My name is Charles E. Richstein and I am a resident of Billings. I am foreman of the Purity Bread Company, and I was with the Purity Bread Company in 1920.

I knew Carl Francis in 1920. He was employed in the Pastry Department where they make cakes, and I was employed in the Bread Department, upstairs. I recall him quite definitely. He and I didn't work together. I saw him right along when he was there. I think he did the work all right. I didn't hear any complaint about his being sick at that time—seemed to be satisfactory while there. I didn't see anything wrong with him physically at that time.

Cross-examination  
by Mr. Smith.

I said that I worked upstairs in the bread shop and Mr. Francis worked downstairs in the pastry department. The bread part is the heavy work. My duties kept me fairly busy in the bread department. I got down to the pastry department quite often. We had a steam boiler down there, and we had to run down quite often. At that time I think there were four employees in the pastry department, if I am not mistaken. I didn't pay any particular attention to Mr. Francis. I didn't understand how he got to be employed there; I didn't understand that the Government put him there. I



(Testimony of Charles E. Richstein.)

don't know whether he had any duties around there as a vocational training student. I was not his immediate supervisor. As far as I know he was working there every day. I couldn't tell you how much work he did in a day's time. [95]

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Mr. EVANS.—The defendant rests.

Mr. SMITH.—The plaintiff rests, Your Honor.

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Mr. EVANS.—At this time we wish to renew our motion for a directed verdict on the ground that the evidence of the plaintiff and all of the evidence is insufficient to support a verdict.

The COURT.—The motion will be overruled.

Mr. EVANS.—I don't believe I noted an exception to the ruling of the Court on the motion for a directed verdict at the close of the plaintiff's case. Will you please note that exception.

The COURT.—You may.

Mr. EVANS.—An exception is hereby made to the ruling of the Court on motion for a directed verdict for the reason and on the ground that there is no substantial evidence in the record that the plaintiff became totally and permanently disabled on the date mentioned in the petition, or at any other time, and for the further reason that, assuming that all the evidence is true as given herein, such evidence is not the sufficient basis to support a finding of permanent and total disability. The

defendant wishes also to make an exception to the remarks of the Court to the witness, Dr. Treacy, in the presence of the jury for the reason that the same is prejudicial and does not state the correct definition of permanent total disability. [96]

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The Court.

You are instructed that in civil cases the affirmative of the issues must be proved, and that when the evidence is contradictory, the decision must be made according to the preponderance of the evidence; and that in this case, it devolves upon the plaintiff to prove his claim by a preponderance of the evidence.

By a preponderance of the evidence is meant the greater weight. The preponderance of the evidence in a case is not alone determined by the number of witnesses testifying to a particular fact or state of facts. In determining upon which side the preponderance of evidence is, the jury should take into consideration the opportunities of the several witnesses for seeing or knowing the things about which they testify; their conduct and demeanor while testifying; their interest or lack of interest (if any) in the result of the suit; the probability or improbability of the truth of their several statements, in view of all of the other evidence, facts and circumstances proved on the trial; and from all these circumstances, determine upon which side is the weight or preponderance of the evidence.

As you have noted, by preponderance is meant the greater weight of the evidence. If you should find the evidence evenly divided, then there would not be a preponderance of the evidence as defined to you, and you should find for the defendant.

You are instructed that this is an action brought under the War Risk Insurance Act and is in the nature of an action on a contract for insurance. For the purpose of determination of this action, it must be taken as conceded that the plaintiff did enter into a contract with the defendant to insure him in the sum of Ten Thousand Dollars against death or total permanent disability suffered or contracted while said policy of insurance was in effect, which policy was payable upon maturity, in the sum of Fifty-seven Dollars and Fifty Cents per month, and if you believe that Carl R. Francis became totally and permanently disabled on or before the 30th day of April, 1919, the date on which his policy would have expired (or on May 11th, 1918, the date on which he was wounded), then his insurance policy matured upon the date when he became [97] totally and permanently disabled as defined in these instructions, and would therefore, be due and payable to this plaintiff from the date upon which he became so totally and permanently disabled at the rate of Fifty-seven Dollars and Fifty Cents per month for each and every month elapsing since the date he became totally and permanently disabled, not to exceed the sum of Ninety-two Hundred Dollars.

You are instructed that you are to consider the term "Total Disability" as any impairment of mind or body, which renders it impossible for the insured to follow continuously a substantially gainful occupation without seriously impairing his health, and that said total disability is to be considered by you as permanent when it is of such nature as to render it reasonably certain that it will continue throughout the lifetime of the insured.

The word "impossible" must be given a rational meaning; it cannot fairly be said that it is possible for an insured to work because under the stimulus of strong will power it is physically possible for him to stick to a task, if the work is done at the risk of substantially aggravating his condition or seriously impairing his health.

The word "continuously," as used in the definition of permanent total disability, is construed as meaning with reasonable regularity, in contradistinction to following a gainful occupation spasmodically. The word "continuously" does not mean every day or some definite fixed period, as a year, or a month, but rather means a substantial portion of time.

A man is permanently and totally disabled if he is unable without injury to his health to make his living by work.

You are instructed that if you should find from the evidence that Carl R. Francis became totally and permanently disabled as defined in these in-

structions, from on or prior to the 11th day of May, 1918 (the date on which he was wounded), and remained so totally and permanently disabled thereafter, that then his insurance did not lapse on April 30th, 1919, nor on any other date, for non-payment of premiums.

You are instructed that in determining whether the said Carl R. Francis is totally disabled, you may take into consideration his previous occupation, learning and experience, in so far as it is shown in evidence. [98]

You are instructed that a thing once proved to exist is presumed to continue as long as usual with things of that nature.

If you believe that any witness who has testified in this case has knowingly and wilfully testified falsely concerning any matter or fact material to the elements of the cause of action charged herein, as defined in these instructions, his or her testimony is to be distrusted by you as to all other matters and facts as to which he testified.

You may not arbitrarily and capriciously disregard testimony of a witness who is not impeached in any of the usual modes known to the law, but whose testimony is reasonable and consistent with all the circumstances proved, bearing upon the material issues involved in this case.

The usual modes of impeachment of a witness, known to the law, as mentioned in the preceding instructions, are:



1. By proving contradictory statements previously made by the witness as to matters relevant to his testimony in the case;

2. By disproving facts testified to by him; and

3. By evidence as to his general bad character.

But whether a witness has been impeached is solely for the jury to determine from all the evidence in the case.

The direct evidence of one witness who is entitled to full credit is sufficient proof of any fact in this case.

A witness entitled to full credit is one whose statements upon the witness stand are within reason and believable.

You are the sole judges of the effect, value and weight of the evidence in this case, and of the credibility of the witnesses. It is solely and exclusively your duty to determine the facts, and this you must do from the evidence presented to you, and then apply the law as given you in these instructions to the facts as you find them.

Every witness who has testified in this case is presumed to have spoken the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by contradictory evidence.

In determining the credibility of any witness, you are to take into account, in weighing his testimony, his interest or want of interest in the result of the

case, his appearance upon the witness stand, his manner of testifying, his apparent candor or want of candor, his intelligence or lack of intelligence, [99] his means of knowledge as to any fact about which he testified, his apparent fairness or lack of fairness, and whether he is supported or contradicted by the facts and circumstances in the case as shown by the evidence.

In determining what are the facts in this case you are not bound to decide in conformity with the statements of any number of witnesses not producing conviction in your minds against a less number, or against other evidence satisfying your minds, or against a presumption created by law.

In determining what are the facts in this case and what verdict, if any, you should return, you will take into consideration only the testimony of the witnesses upon the witness stand in this case and such documentary evidence and exhibits as have been admitted.

You must not allow yourselves to consider or be in any manner influenced by anything which you may have seen, heard or read outside of the evidence and exhibits in this case.

Your verdict must be based solely upon the evidence and instructions of the Court presented and read to you in the course of the trial.

By no remark by the Court during the trial, nor by these instructions or otherwise, does the Court or did the Court express any opinion as to the

facts in the case. It is for you and not the Court to determine what the facts are.

You should not give any weight to statements of counsel heretofore made to you, which are not supported by the evidence presented to you and by the instructions of the Court. Counsel are, however, privileged to argue and comment upon the law as given you in these instructions, in their arguments to you.

Testimony has been given by certain witnesses who, in law, are termed experts, and in this connection, you are advised that, while in cases such as the one being tried, the law receives the evidence of men expert in certain lines as to their opinions derived from their knowledge of particular matters, the ultimate weight which is to be given to the testimony of expert witnesses is a question to be determined by the jury, and there is no rule of law which required you to surrender your own judgment based upon credible evidence to that of any person testifying as an expert witness; in other words, the testimony of an expert, like that of any other witness, is to be received by you and given such weight as you think it is properly entitled to. [100]

The value of such testimony depends upon the circumstances of each case, and of these circumstances, the jury must be the judges. When expert witnesses testify to matters of fact, from personal knowledge, then their testimony as to such facts within their personal knowledge should be con-

sidered the same as that of any other witnesses who testify from personal knowledge.

It is your duty to weigh all the evidence, and reconcile it, if possible; but if you find irreconcilable conflict in the evidence, then you should take the evidence which you consider worthy of credit, and give it such weight, under the rules of law submitted to you by the Court, as you believe it is entitled to receive.

It takes twelve of your number, concurring, to agree upon any verdict which you may return in this case.

When you retire to your jury room, you should select one of your number as foreman.

The Court. Are there any exceptions to the instructions?

Mr. Smith. None for the plaintiff.

Mr. Evans. None for the defendant.

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Whereupon the jury retired to deliberate upon their verdict and subsequently returned into Court their verdict and subsequently judgment was ordered and entered.

Which were all proceedings had and testimony adduced upon the trial of said cause.

And afterward the Court, made an order granting to the defendant an extension of ninety days from June 9th, 1932, in which to prepare and serve a draft of its proposed bill of exceptions herein.

And now comes defendant, the United States of America, and submits the foregoing, its proposed bill of exceptions in this cause.

Dated this 1st day of September, 1932.

WELLINGTON D. RANKIN,  
United States Attorney.

D. L. EGNEW,  
Assistant United States Attorney.

D. D. EVANS,  
Attorney, Veterans Administration,  
Attorneys for Defendant.

Service of the foregoing bill of exceptions and receipt of a copy thereof is hereby acknowledged and accepted this 6th day of September, 1932.

PHILIP SAVARESY &  
GEORGE S. SMITH,  
Attorneys for Plaintiff. [101]

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[Title of Court and Cause.]

**CERTIFICATE OF JUDGE TO BILL OF  
EXCEPTIONS.**

This is to certify that the foregoing bill of exceptions tendered by the defendant, with the amendments thereto made, as stipulated for by counsel for the plaintiff and defendant, is correct in every particular and is hereby settled and allowed as the bill of exceptions herein and made a part of the record in this cause.



Dated this 30th day of September, 1932.

CHARLES N. PRAY,  
Judge.

[Endorsed]: Filed Sept. 3, 1932. C. R. Garlow,  
Clerk. [102]

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That on September 2, 1932, Petition for Allowance of Appeal was duly filed herein, which is in the words and figures following, to-wit: [103]

[Title of Court and Cause.]

PETITION FOR ALLOWANCE OF APPEAL.

The Honorable, the District Court of the United States in and for the District of Montana:

Comes now the United States of America, defendant above named, and petitions the Court for an appeal herein, and respectfully represents that on the 17th day of June, 1932, a final judgment was rendered and entered herein ordering and adjudging that the plaintiff herein do have and recover of and from the defendant United States of America, the sum of \$9,200.00.

That the United States conceiving itself aggrieved by the judgment aforesaid respectfully represents that certain errors were committed in the said judgment and proceedings had prior thereto, to the prejudice of said defendant United States of America, all of which more fully appears from the assignment of errors, which is filed herewith;

WHEREFORE, the defendant United States of America prays that an appeal be allowed it from the District Court of the United States for the District of Montana to the United States Circuit Court of Appeals for the Ninth Circuit, and that a citation issue as provided by law and that transcript of record, proceedings and papers upon which said judgment was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit sitting in the City and County of San Francisco, State of California, and that said judgment be reversed, set aside and held for naught. [104]

Dated this 2nd day of September, 1932.

WELLINGTON D. RANKIN,  
United States Attorney,  
D. L. EGNEW,  
Assistant United States Attorney,  
D. D. EVANS,

Insurance Attorney Veterans' Administration,  
Attorneys for Defendant.

[Endorsed]: Filed Sept. 2, 1932. C. R. Garlow,  
Clerk. [105]

That on September 2, 1932, Order Allowing Appeal was duly filed herein, which is in the words and figures following, to-wit: [106]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Upon reading and considering the foregoing petition for allowance of an appeal together with the assignments of error on file herein;

IT IS HEREBY ORDERED that the appeal of the United States of America from the judgment entered in the above entitled Court and cause on the 17th day of June, 1932, be and the same is hereby allowed, and it appearing that said appeal is being brought by the United States, the same shall operate as a supersedeas.

Dated this 2nd day of September, 1932.

CHARLES N. PRAY,  
Judge.

[Endorsed]: Filed Sept. 2, 1932. C. R. Garlow,  
Clerk. [107]

That on September 2, 1932, Prayer for Reversal was duly filed herein, which is in the words and figures following, to-wit: [108]

[Title of Court and Cause.]

### PRAYER FOR REVERSAL.

Comes now the defendant United States of America, in the above entitled action and prays that the final judgment entered herein in the District Court of the United States for the District of Montana, on the 17th day of June, 1932, be reversed by the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further orders as may be fit and proper in the premises be made in the above entitled cause by said Circuit Court of Appeals.

Dated this 2nd day of September, 1932.

WELLINGTON D. RANKIN,  
United States Attorney,  
By D. L. EGNEW,  
Assistant United States Attorney,  
D. D. EVANS,

Insurance Attorney Veterans' Administration,  
Attorneys for Defendant.

[Endorsed]: Filed Sept. 2, 1932. C. R. Garlow,  
Clerk. [109]

That on September 2, 1932, Assignment of Errors was duly filed herein, which is in the words and figures following, to-wit: [110]

[Title of Court and Cause.]

### ASSIGNMENT OF ERRORS.

Comes now the United States of America, defendant and appellant in the above entitled action, and files the following Assignment of Errors upon which it will rely in the prosecution of its appeal from the judgment in said suit made and entered by the above entitled Court on the 17th day of June, 1932.

1. The Court erred in denying the defendant's motion to direct a verdict in favor of said defendant, which motion was made at the close of the plaintiff's case for the reasons that:

a. The evidence presented by the plaintiff was not sufficient to sustain a verdict in his favor;

b. The evidence did not show permanent and total disability on or before April 30, 1919, as required to permit the plaintiff to recover;

c. The evidence viewed in the light most favorable to the plaintiff does not reasonably lead to the conclusion that Carl R. Francis was permanently and totally disabled on or before April 30, 1919, because the evidence affirmatively shows that he had been following continuously the substantially gainful occupation of a cook and waiter since April 30, 1919, and up to the time of the trial. It was not shown that he suffered any loss under the insurance



contract in that he was able to and did follow the substantially gainful occupation of cook and waiter as continuously after the lapse of his insurance as before the application for insurance.

2. The Court erred in overruling the renewed motion for [111] a directed verdict made by the defendant at the close of all of the evidence for the same reasons enumerated and set forth in specification No. 1, and for the further reason that all of the evidence and the written admissions of the plaintiff and the medical evidence of the defendant conclusively show that the plaintiff at the time of the trial of the action was not permanently and totally disabled and therefore could not have been permanently and totally disabled on April 30, 1919, or at any intervening date and all the evidence conclusively shows that the work done by the plaintiff was continuous, was gainful, was employment, was not detrimental to his health, was never total except for a few weeks at a time, and that such total disability was never conclusively shown to be permanent. The evidence that the plaintiff worked nine years and eleven months out of twelve years' elapsed time at an occupation which returned to him more than \$15,000.00 during that time, is so overwhelming as to leave no room to doubt that the plaintiff had ability during that time to follow continuously a gainful occupation and to be inconsistent with the hypothesis that he was suffering from an impairment of mind or body that could, would and did prevent him from following any substan-

tially gainful occupation during the twelve years covered by the evidence.

3. The Court erred in propounding the question: "Suppose he is able to work for two years and eight months, and the evidence should show that, while he has been employed we will say continually, he has not been able to work continuously. Suppose occasionally and at frequent periods he has been ill from the cause you describe and as stated has not been up for three or four days at a time, and frequently during that entire period, other good natured and friendly men and women have done his work for him; that he had frequent fainting spells, as testified, then what would you say to this?" to the witness, Dr. Treacy, in the presence of the jury in that said remarks and question were: improper and prejudicial in that:

a. The jury was led to believe that the loss of one [112] month each year on account of sickness would constitute permanent total disability;

b. The jury was led to believe that a man who follows a gainful occupation for two years and eight months and draws pay for that time was not following continuously a substantially gainful occupation because at frequent periods he had been ill and had been in bed for three or four days at a time and because during that period other good natured and friendly men and women had done his work for him and because he had had frequent fainting spells;

c. The jury was led to believe that if the plaintiff was able to work for two years and eight months continually, it was not necessarily evidence that he was able to work continuously under the meaning of the definition of permanent total disability.

4. The Court did not correct this error in his instructions, although given an opportunity to do so by the exception of the defendant made before instructions as follows: "The defendant wishes to make an exception to the remarks of the Court to the witness, Dr. Treacy, in the presence of the jury for the reason that the same is prejudicial and does not state the correct definition of permanent total disability." The jury is led to believe that the specific evidence in the instant case in the mind of the Court was overwhelming that the plaintiff was "not able to work continuously" and in effect this was a direction of a verdict for the plaintiff and against the defendant.

5. The Court erred in discussing the evidence in its relation to the definition of permanent total disability in the presence of the jury to the witness, Dr. Treacy, and in not correcting the error, if it was error, by a discussion of the concrete evidence in the case to the jury in his instructions, which the Court had a right to do and which it was his duty to do, having previously discussed the same evidence in [113] relation to the definition of permanent total disability.

WHEREFORE, the defendant prays that the judgment be reversed.

WELLINGTON D. RANKIN,  
U. S. District Attorney  
For the District of Montana.

By D. L. AGNEW,  
Assistant U. S. District Attorney.

D. D. EVANS,  
Chief Attorney,  
Veterans Administration,  
(Attorneys for the Defendant).

[Endorsed]: Filed Sept. 2, 1932. C. R. Garlow,  
Clerk. [114]

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That on September 3, 1932, stipulation extending time to and including November 7, 1932, in which to prepare and file a bill of exceptions herein, was duly filed herein, being as follows, to-wit: [115]

[Title of Court and Cause.]

STIPULATION.

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the plaintiff and the defendant respectively, that the defendant may have, in addition to the time heretofore allowed by the Court, to and including November 7th, 1932, in which to prepare and file its bill of exceptions herein.

Dated this 1st day of September, 1932.

PHILIP SAVARESY,

GEORGE S. SMITH,

Attorneys for Plaintiff.

WELLINGTON D. RANKIN,

United States Attorney.

By D. L. AGNEW,

Asst. U. S. Atty.,

Attorneys for Defendant.

[Endorsed]: Filed Sept. 3, 1932. C. R. Garlow,  
Clerk. [116]

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That on September 7, 1932, citation on appeal was duly filed herein, which original citation is hereto annexed, being as follows, to-wit: [117]

[Title of Court and Cause.]

#### CITATION ON APPEAL.

The President of the United States of America to  
Carl R. Francis, and Philip Savaresy and  
George S. Smith, Attorneys for said plaintiff,  
GREETING:

You and each of you are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, State of California, within thirty (30) days from the date hereof, pursuant to an order allowing an appeal filed in the District Court of the United States for the District



of Montana from the District Court of the United States for the District of Montana to the United States Circuit Court of Appeals for the Ninth Circuit in a suit wherein the United States of America, is defendant and appellant and you Carl R. Francis are the plaintiff and appellee to show cause, if any there be, why the judgment rendered on the 17th day of June, 1932, against the United States of America mentioned in said appeal, should not be corrected and reversed, and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the City of Great Falls, in the District Court of the United States for the District of Montana, this 2nd day of September, 1932.

CHARLES N. PRAY,  
Judge. [118]

Personal service of the foregoing citation on appeal, petition for allowance of appeal, prayer for reversal, assignment of errors and order allowing appeal, and receipt of copies thereof admitted this 6th day of September, 1932.

PHILIP SAVERESY &  
GEORGE S. SMITH,  
Attorneys for Plaintiff. [119]

[Endorsed]: Filed Sept. 7, 1932, C. R. Garlow,  
Clerk. [120]

Thereafter, on November 12, 1932, Praecipe for Transcript was duly filed herein, being in the words and figures, following, to-wit: [121]

[Title of Court and Cause.]

### PRAECIPE FOR TRANSCRIPT.

To the Clerk of the above-entitled Court:

You will please prepare a transcript of the record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit, pursuant to an appeal allowed in the above-entitled cause, and incorporate in such transcript of record the following papers as exhibits:

1. Complaint.
2. Answer.
3. Bill of exceptions signed, settled and allowed herein.
4. Verdict.
5. Judgment.
6. Petition for allowance of appeal.
7. Order allowing appeal.
8. Prayer for reversal.
9. Assignment of errors.
10. Citation on appeal.
11. This praecipe with acknowledgment of service thereon.
12. Stipulation entered extending time to November 7, 1932, to lodge defendant's proposed bill of exceptions.

Said transcript to be fully certified by you as required by law and the rules of the above-entitled Court, and the rules of [122] the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 9th day of November, 1932.

WELLINGTON D. RANKIN,  
United States Attorney.  
D. L. EGNEW,  
Assistant U. S. Attorney.  
D. D. EVANS,  
Insurance Attorney.

Service of the foregoing praecipe and receipt of copy admitted this 9th day of November, 1932.

PHILIP SAVARSEY &  
GEORGE S. SMITH,  
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 12, 1932. C. R. Garlow,  
Clerk. [123]

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That on September 30, 1932, an Order was duly made and entered herein extending time to and including November 1, 1932, in which to file transcript on appeal in the Circuit Court of Appeals, which is as follows, to-wit: [124]

[Title of Court and Cause.]

ORDER.

Upon application of appellant and good cause therefor appearing,

It is hereby ordered, that the time within which appellant in the above entitled case, now on appeal from the United States District Court for the District of Montana, may file its Transcript on Appeal and docket the above case in the Circuit Court of Appeals for the Ninth Circuit is hereby extended to and including the 1st day of November, A. D. 1932.

Dated this 30th day of September, 1932.

CHARLES N. PRAY,  
Judge.

Entered Sept. 30, 1932. C. R. Garlow, Clerk.  
[125]

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That on October 31, 1932, an order was duly made and entered herein extending time to and including December 1, 1932, in which to file transcript on appeal in the Circuit Court of Appeals, which is as follows, to-wit: [126]

[Title of Court and Cause.]

**ORDER.**

Upon application of appellant and good cause therefor appearing,

It is hereby ordered, that the time within which appellant in the above-entitled case, now on appeal from the United States District Court for the District of Montana, may file its transcript on appeal and docket the above case in the Circuit Court of

Appeals for the Ninth Circuit is hereby extended to and including the 1st day of December, A. D. 1932.

Dated this 31st day of October, 1932.

CHARLES N. PRAY,  
Judge. [127]

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CLERK'S CERTIFICATE TO TRANSCRIPT  
OF RECORD.

United States of America,  
District of Montana.—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 128 pages, numbered consecutively from 1 to 128, inclusive, is a full, true and correct transcript of the record and proceedings in the within entitled cause, and all that is required by praecipe filed, to be incorporated in said transcript, as appears from the original records and files of said court in my custody as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original Citation issued in said cause.

I further certify that the costs of said transcript of record amount to the sum of \$24.55, and have



been made a charge against the appellant, the United States of America.

Witness my hand and the seal of said court at Helena, Montana, this 21st day of November, 1932.

[Seal]

C. R. GARLOW,

Clerk as aforesaid.

By H. H. WALKER,

Deputy. [128]

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[Endorsed]: No. 7010. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, v. Carl R. Francis, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed November 25, 1932.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.